Supreme Court, U.S.
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OFFICE OF

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CLIFTON S. COREY
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress intended 18 USC §7(3), defining the "special . . . territorial jurisdiction of the United States," to apply extraterritorially by implication and contrary to both international law and the presumption against extraterritoriality to crimes committed on "lands" used by the Untied States in the sovereign territory of foreign nations?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Clifton S. COREY ("Petitioner") respectfully prays that a writ of certiorari issue to review the November 20, 2000, judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding in order to resolve the conflict among the Second, Fourth, and Ninth Circuits on the important statutory interpretation, territorial jurisdiction, and international law issues presented herein.

OPINIONS BELOW

The November 20, 2000, reported opinion of the United States Court of Appeals for the Ninth Circuit, *United States v. Corey*, is found at 232 F.3d 1166 (9th Cir. 2000), and is reprinted at App. 1. The Ninth Circuit denied Petitioner's petition for rehearing and suggestion for rehearing *en banc* by Order filed April 9, 2001, which is reprinted at App. 78. The Ninth Circuit Judgment is reprinted at App. 79.

The Order Granting the Government's Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law During Trial, filed July 7, 1997, and the Order Denying Defendant's Motion to Dismiss Indictment and Granting the Government's Motion in Limine, filed April 16, 1998, of the United States District Court for the District of Hawaii, Chief Judge David A. Ezra, were unreported. The two decisions of the district court are preprinted at App. 81 and App. 94 respectively.

STATEMENT OF JURISDICTION

Petitioner was indicted in the District of Hawaii for sexual assault and abuse under 18 USC §§2241(a) and 2242(1). The Third Superseding Indictment charged acts of sexual assault and abuse by Petitioner which allegedly occurred between 1992 and 1996 in base housing at Yokota Air Base, Japan, a United States military base, and in an apartment in Manila, the Philippines, rented by the United States Embassy for members of its administrative staff. Petitioner operated the Air Force Post Offices at Yokota Air Base near Tokyo and the United States Embassy in Manila as a civilian employee of the United States Air Force in both locations. Pursuant to 28 USC §§1291 and 1294(1), Petitioner timely appealed to the Ninth Circuit from his conviction. In a reported opinion filed November 20, 2000 (232 F.3d 1166), the opinion for which certiorari review is sought in this Court, the Ninth Circuit majority affirmed the district court's rulings that the United States has territorial jurisdiction pursuant to 18 USC §7(3) over Yokota Air Base, Japan, and an apartment rented by the United States Embassy in Manila. In a separate memorandum opinion filed November 20, 2000, the Ninth Circuit unanimously vacated Petitioner's conviction based on trial error and remanded this case for a new trial. The judgment of the Ninth Circuit was also filed on November 20, 2000. On April 9, 2001, the Ninth Circuit denied Petitioner's timely-filed motion for rehearing and suggestion for rehearing *en banc* on the territorial jurisdiction issue. Pursuant to Supreme Court Rule 13, this petition has been filed within ninety days of the April 9, 2001, denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

STATUTES INVOLVED

18 USC §7(3). Special maritime and territorial jurisdiction of the Untied States defined.

The term "special . . . territorial jurisdiction of the United States", as used in this title, includes:

* * * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

* * * *

18 USC §2241. Aggravated sexual assault.

(a) By force or threat. -- Whoever, in the special maritime and territorial jurisdiction of the United States or in a federal prison, knowingly causes another person to engage in a sexual act -

(1) by using force against the other person; or

(2) by threatening or placing the other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

18 USC §2242. Sexual abuse.

Whoever, in the special maritime and territorial jurisdiction of the United States or in a federal prison, knowingly --

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping);

* * * *

or attempts to do so, shall be fined under this title, imprisoned no more than 20 years, or both.

18 USC §3238. Offenses not committed in any district.

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

STATEMENT OF THE CASE

Petitioner was indicted in the District of Hawaii in 1996 under 18 USC §§2241(a) and 2242(1) for allegedly committing acts of sexual assault and abuse against his adopted stepdaughter, Anna Corey. Venue was predicated in the District of Hawaii under 18 USC §3238 as a result of Petitioner's arrest in Honolulu. Prior to the first trial in this case (which eventually ended in a hung jury mistrial), the government filed a First and then Second Superseding Indictment. The Second Superseding Indictment alleged counts of sexual assault and abuse which occurred at two locations over a period from 1992 to 1996 outside the territory of the United States - some at base housing on Yokota Air Base, Japan, a United States military base (hereafter sometimes referred to as "the Yokota counts"), and some at an apartment at Lopez Court rented by the United States Embassy in Manila, the Philippines, for Petitioner's use as a member of the embassy administrative staff (hereafter sometimes referred to as "the Manila counts"). Petitioner operated the Air Force Post Offices at Yokota Air Base and the United States Embassy in Manila as a civilian employee of the United States Air Force in both locations. For technical reasons, the Yokota counts in the Second Superseding Indictment were dismissed prior to the first trial. After the Yokota counts were dismissed, the issue of whether the United States has territorial jurisdiction over Lopez Court, Manila, was raised prior to the first trial by the government's Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law During Trial. The district court ruled that the apartment at Lopez Court rented for Petitioner as a member of the embassy administrative staff

in Manila, the Philippines, was part of "lands" within the "special . . . territorial jurisdiction of the United States" as defined by 18 USC §7(3). As noted above, the first trial ended in a hung jury mistrial.

After the first trial, the government filed a Third Superseding Indictment. This version of the Indictment added back the Yokota counts. Prior to the second trial, the government filed a Motion to Determine Jurisdiction in Counts 8-11 (the Yokota counts). The government's motion prior to the second trial only sought determination regarding jurisdiction as to the Yokota counts because the district court had ruled on the jurisdictional issue as to the Manila counts prior to the first trial. Prior to the second trial, Petitioner responded to the government's Yokota count motion by filing a Motion to Dismiss Indictment. Petitioner's motion asked the district court to reconsider its previous decision that the United States has territorial jurisdiction over Lopez Court, Manila, and further challenged the claim of the government that the United States has territorial jurisdiction over Yokota Air Base, Japan. The district court resolved these motions by filing its Order Denying Defendant's Motion to Dismiss Indictment and Granting the Government's Motion in Limine. In this order, the district court affirmed its earlier ruling that the United States has territorial jurisdiction over Lopez Court, Manila, and ruled that the United States also has territorial jurisdiction over Yokota Air Base, Japan.

At his second trial, Petitioner was acquitted on three of the Manila counts of the Third Superseding Indictment and convicted of the remaining Manila counts and all of the Yokota counts.

On appeal, the Ninth Circuit unanimously vacated Petitioner's conviction based on trial error, but the majority affirmed the district court's ruling that the United States has territorial jurisdiction over the foreign "lands" in issue. Because the Ninth Circuit majority found there was territorial jurisdiction, this case was remanded for a new trial. Circuit Judge Kozinski, with whom Circuit Judge Kleinfeld joined, authored the majority opinion, and Circuit Judge McKeown dissented. Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied. Judge McKeown would have granted the petition for rehearing.

REASONS FOR GRANTING THE PETITION

1. There is a split among the Second, Fourth, and Ninth Circuits as to whether Congress intended that 18 USC §7(3) apply extraterritorially.

Five months before the Ninth Circuit decided the instant case, the Second Circuit decided *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000). The defendant in *Gatlin* had been convicted under 18 USC §2243(a) of sexual abuse of a minor which occurred on a United States military base in Germany which military base the prosecution claimed was part of "lands" within the "special . . . territorial jurisdiction of the United States" as defined by 18 USC §7(3). The Second Circuit held in *Gatlin* that 18 USC §7(3) does not apply extraterritorially, *i.e.*, outside the territory of the United States over the sovereign territory of foreign nations. Because the United States military base in Germany was outside the territory of the United States,

the Second Circuit reversed Gatlin's conviction and dismissed the indictment for lack of both territorial and personal jurisdiction. When the Ninth Circuit decided the instant case, the majority recognized that its conclusion applying 18 USC §7(3) extraterritorially was in direct opposition to the holding of the Second Circuit. 232 F.3d at 1172-76; App. at 10-21.

On the specific territorial jurisdiction issue raised here, the Ninth Circuit is in apparent conflict with the Fourth Circuit. In *United States v. Erdos*, 474 F.2d 157 (4th Cir.), *cert. denied*, 414 U.S. 876 (1973), the Fourth Circuit held that the premises of the United States Embassy in Equatorial Guinea are within the "special . . . territorial jurisdiction of the United States" as defined in 18 USC §7(3) *because the premises of a United States embassy are United States territory*. 474 F.2d at 159. The Ninth Circuit majority in the instant case claimed to be in agreement with *Erdos* (232 F.3d at 1172; App. at 9-10), but this is clearly untrue. *Erdos* applied the "special . . . territorial jurisdiction of the United States" to what it thought was the *territory of the United States, i.e.*, a United States Embassy. By contrast, the Ninth Circuit majority applied the "special . . . territorial jurisdiction of the United States" to the *sovereign territory of two foreign nations* which territory is clearly *not* the territory of the United States. The flaw in *Erdos* is that the premises of a United States Embassy are *not* United States territory but the sovereign territory of the host nation. *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983); Jordan J. Paust, *Non-Extraterritoriality of "Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of Erdos*, 24 Yale J. Int'l L. 305 (1999) (hereinafter "Paust"). The Fourth

Circuit in *Erdos*, like the Second Circuit in *Gatlin*, recognized that 18 USC §7(3) applies to the *territory of the United States*. Nowhere in *Erdos* did the Fourth Circuit suggest or imply that 18 USC §7(3) could apply to the sovereign territory of foreign nations. By contrast, the Ninth Circuit majority applied 18 USC §7(3) to "lands" which are *indisputably not the territory of the United States* and for which the host nations have not ceded *territorial* jurisdiction to the United States. Contrary to the implication of the Ninth Circuit majority (232 F.3d at 1181-83; App. at 32-38), the Status of Forces Agreement (SOFA) with Japan and the Vienna Convention do not cede *territorial* jurisdiction of any nation to any other nation. Paust at 313-14, 325-27.

This split in the circuits creates serious problems. For example, the Ninth Circuit majority's claim that the presumption against extraterritoriality (*see* Sec. 2, *infra*) does not apply to jurisdictional statutes (232 F.3d at 1170-71; App. at 5-7) is a broad statement of law which applies far beyond the criminal law context of the instant case.

Further, under 18 USC §3238, entitled "Offenses not committed in any district," an offender is to be tried in the district where he or she "is arrested or first brought." This means that a defendant indicted in the Ninth Circuit, pursuant to a claim of territorial jurisdiction under 18 USC §7(3), based upon activities which occurred in the sovereign territory of a foreign nation, can evade prosecution in the United States for the alleged offense committed overseas by going directly from overseas to the Second Circuit and never leaving. This would be an intolerable situation.

This Court should resolve the conflict among the Second, Fourth, and Ninth Circuits (*see* Supreme Court

Rule 10 (a)), especially because the Second and Ninth Circuits include the busiest ports of entry into the United States, and it is within these circuits that the territorial jurisdiction issue raised herein is most likely to arise again.

2. By refusing to apply the presumption against extraterritoriality, the Ninth Circuit majority interpretation of 18 USC §7(3) violates international law by its implicit claim to United States sovereignty over the sovereign territory of foreign nations.

This Court held in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), that there is a presumption against extraterritorial application of statutes which presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." More generally, this Court has demanded that a claimed reach of a federal statute extraterritorially be clearly manifest, if not also clearly expressed, or the statute will be held to be nonextra-territorial. *United States v. Bowman*, 260 U.S. 94, 97-98 (1922); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting); Paust at 308-09 & ns.9-10. The Ninth Circuit majority expressly refused to apply the presumption against extraterritoriality to 18 USC §7(3) and instead held that a "jurisdictional statute" such as 18 USC §7(3) is subject only to the "standard tools of statutory interpretation." 232 F.3d at 1170-71; App. at 5-7. This holding also conflicts with Justice Frankfurter's admonishment in *Romero v. International Terminal Operating*

Co., 358 U.S. 354, 379 (1959), that federal courts must be hesitant "to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes."

By ignoring the presumption against extraterritoriality, the Ninth Circuit majority created the very "unintended clash" that the presumption seeks to avoid. The Ninth Circuit majority opinion permits the United States to extend its territorial jurisdiction over the sovereign territory of foreign nations. Unfortunately, such an extension of territorial jurisdiction by the United States violates international law because territorial jurisdiction is an attribute of national sovereignty. *See Restatement (Third) of the Foreign Relations Law of the United States*, §402 (1987); Ian Brownlie, *Principles of Public International Law* 309-10 (3d ed. 1979); Paust at 310-12. "An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (quoting Chief Justice Marshall). Congressional intent to override international law must be clear and unequivocal. *See, e.g., Cook v. United States*, 288 U.S. 102, 119-20 (1993); Paust at 314 & n.35. No such congressional intent exists with respect to 18 USC §7(3).

No foreign nation claims territorial jurisdiction over the territory of the United States in the same manner that the Ninth Circuit majority has construed 18 USC §7(3) to assert United States territorial jurisdiction over the sovereign territory of foreign nations. When the governments of friendly foreign nations in which the United States maintains military bases discover that the United States is claiming territorial jurisdiction over their sovereign territory, it is inevitable that these nations will file diplomatic protests against the United States' violation

of international law in asserting such jurisdiction. Most certainly, were a foreign nation, in response to the Ninth Circuit majority opinion, to claim territorial jurisdiction over the sovereign territory of the United States, the United States would file a diplomatic protest with that nation. Query then whether it is appropriate for the Ninth Circuit to hold that Congress, in enacting 18 USC §7(3), intended *by implication* and contrary to the presumption against extraterritoriality to violate international law by extending Untied States sovereignty to the sovereign territory of foreign nations?

3. The Ninth Circuit majority interpretation of 18 USC §7(3) is an improper intrusion into the foreign policy-making powers vested by the United States Constitution in the Executive and Legislative Branches.

At a time when the United States is shifting its foreign and military policy emphasis to the Pacific basin, it is important that this Court address the foreign policy as well as the international law implications of the Ninth Circuit majority opinion in view of the Ninth Circuit's proximity to the Pacific basin. Under the Constitution, the foreign policy-making power is vested in the Executive Branch. The power to enact jurisdictional statutes for crimes committed abroad is vested in the Legislative Branch.

From the foreign policy perspective, the Ninth Circuit majority opinion has very significant implications. For example, consider the situation of two Philippine citizens, who have no connection whatsoever with the United States, who engage in conduct on the premises of

housing rented for United States Embassy staff in Manila which conduct would constitute a crime under United States criminal law if committed within the "special . . . territorial jurisdiction of the United States." By application of the Ninth Circuit majority's opinion, these Philippine citizens would be subject to criminal prosecution anywhere in the Ninth Circuit in the United States regardless of whether United States' interests were implicated. This would be true even if the conduct of the Philippine citizens did not constitute a crime in the Philippines. Also, by the logic of the Ninth Circuit majority opinion, citizens of foreign countries are subject to United States criminal law any time they enter a United States military base in a foreign country even if their crimes do not implicate the United States in any way.

The Ninth Circuit majority opinion asserts that "American foreign policy" is not "served" by construing 18 USC §7(3) in the limited manner the Second Circuit did in *Gatlin* and that the territorial jurisdiction of 18 USC §7(3) over the sovereign territory of foreign nations will never be invoked if the foreign sovereign objects. 232 F.3d at 1171 & 1176. However, if the existing language of 18 USC §7(3) is to be construed, as the Ninth Circuit majority construed it, to apply to the sovereign territory of foreign nations, there is no existing language in the statute which would limit the statute's reach based on the objection of a foreign nation. As long as the power recognized by the Ninth Circuit majority opinion exists to prosecute crimes in the sovereign territory of a foreign nation, a United States attorney within the Ninth Circuit can and will use this power to prosecute one or more foreign nationals based on a claim of territorial jurisdiction without regard to the wishes of the foreign sovereign involved. Query if

the Ninth Circuit's majority opinion has not resulted in the judiciary's intruding into the foreign policy-making power that is vested in the Executive Branch and the legislative power that is vested in the Legislative Branch?

4. The Ninth Circuit majority interpretation of 18 USC §7(3) essentially renders the Military Extra-territorial Jurisdiction Act of 2000 (MEJA) a meaningless statute and conflicts with clearly expressed congressional intent in the MEJA.

The United States has never before claimed *territorial* jurisdiction over the sovereign territory of foreign nations, so prosecutions by the United States of crimes committed outside United States territory has never been based on *territorial* jurisdiction. With respect to civilians accompanying the United States Armed Forces, prior to 1957, the United States prosecuted crimes committed by these civilians outside United States territory based on *personal* jurisdiction under the Uniform Code of Military Justice. However, since this Court decided *Reid v. Covert*, 354 U.S. 1 (1957), and its progeny (striking down court-martial jurisdiction over civilians in time of peace), there has existed an absence even of personal jurisdiction over "the most common and most serious crimes . . . [f]or example, rape, sexual assault, theft, aggravated assault, robbery, and burglary" (*see* OJAC Report, *infra*, at 40-41) committed by civilians accompanying the United States Armed Forces outside United States territory. This lack of jurisdiction has been referred to as the "jurisdictional gap." *Gatlin*, 216 F.3d at 220-21. When this Court decided *Reid v. Covert*, it

recognized the existence of the "jurisdictional gap," because the government raised this point in its argument to this Court. 354 U.S. at 48 (Frankfurter, J., concurring).

The Ninth Circuit majority opinion claims that, in enacting 18 USC §7(3), Congress never intended that there be any "jurisdictional gap." 232 F.3d 1172-76, 1183; App. at 9-21, 38-39. Yet, as noted in *Gatlin*, Congress failed on more than thirty occasions over forty years to close the "gap" which it knew existed. 216 F.3d at 222. This "gap" is referred to by the Ninth Circuit majority as a "get-out-of-jail-free-card." 232 F.3d at 1176; App. at 21. With respect to the instant case, this is clearly incorrect because Petitioner could in fact be subject to prosecution in Japan and the Philippines for his alleged crimes. By contrast, the wives who murdered their military husbands in *Reid v. Covert* did indeed "get out of jail free" because they could not even be prosecuted by the countries in which they committed their crimes (the United Kingdom and Japan) under the laws as they existed at that time.

In 1996, by act of Congress, the Overseas Jurisdiction Advisory Committee (OJAC) was appointed by the Secretary of Defense and the Attorney General to advise Congress about the problem of the "jurisdictional gap." The OJAC filed its report to Congress on April 18, 1997, confirming the view of *all* commentators that the "jurisdictional gap" did indeed exist. The OJAC report was endorsed and signed by a representative of the Department of Justice, but in the instant case, the Department of Justice takes a position contrary to its position in the OJAC report by now claiming that the "gap" has never existed. Query whether it is appropriate for the Department of Justice to be taking contrary positions on the important territorial jurisdiction issue

raised here - telling Congress one thing and the federal courts the exact opposite?

In 2000, pursuant to the urging of the OJAC in its report, Congress enacted the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) (18 USC §3261 *et seq.*) to close *at least some* of the "gap." As discussed below, the MEJA does not close *all* of the "gap." The MEJA, a *personal* jurisdiction statute, provides in section 3261(a):

> Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States - (1) while employed by or accompanying the Armed Forces outside the United States: or (2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punishable as provided for that offense.

Because Petitioner was a civilian employed by the United States Air Force at Yokota Air Base in Japan and in the United States Embassy in the Philippines, his alleged conduct would have violated the MEJA if the statute had existed in 1992-1996, the period during which Petitioner's alleged criminal conduct occurred. *No such statute existed during the period of Petitioner's alleged criminal conduct* so the federal courts did not have jurisdiction over Petitioner's alleged conduct.

As the OJAC report showed, *all* departments of the United States government and *all* commentators agreed that, both before and after *Reid v. Covert*, there was no

basis for applying the United States criminal code outside the territory of the United States *under 18 USC §7(3)*. This is exactly what the Second Circuit recognized in *Gatlin*, and this is the reason the *Gatlin* court directed that its opinion be sent to Congress where the *Gatlin* court requested that Congress solve the "jurisdictional gap" problem through appropriate legislation. 216 F.3d at 223. When the *Gatlin* decision was conveyed to Congress, Congress was already well on its way to enacting the MEJA based on the recommendation of the OJAC. If the Ninth Circuit majority is correct in rejecting the conclusions of the OJAC report as well as the opinions of *all* of the commentators, as it did (232 F.3d at 1183: App. at 38-39) in order to extend 18 USC §7(3) to the sovereign territory of foreign nations, then there was no need for Congress to enact the MEJA. Query if there was indeed no need for Congress to enact the MEJA?

Note that the MEJA certainly did not close *all* of the "gap." The MEJA and 18 USC §7(3), as interpreted by the Ninth Circuit majority, are not co-extensive. Because the MEJA is a *personal* jurisdiction statute, it applies to crimes committed by a certain class of people (persons employed by or accompanying the Armed Forces of the Untied States and members of the Armed Forces) *no matter where they are*. Because 18 USC §7(3) is a *territorial* jurisdiction statute, it applies to all crimes committed in a certain area ("the special . . . territorial jurisdiction of the United States) by *any person, no matter who the person is* - the person can be a United States citizen or a foreign national. Thus, activities which constitute crimes under the federal criminal code committed on "lands," as defined in 18 USC §7(3) under the Ninth Circuit majority opinion, in foreign

nations by persons who are not covered by the MEJA may be prosecuted in the Ninth Circuit. Generally, the sweep of 18 USC §7(3) is far greater than the sweep of the MEJA because 18 USC §7(3) applies to *all* people in a given location. It is clear that enactment of the MEJA has not eliminated the territorial jurisdiction issue and associated international law problems created by the split in the circuits over the interpretation of 18 USC §7(3).

The principle example of this broader sweep of 18 USC §7(3) is its application to nationals and residents of the foreign nations hosting United States Embassies and military bases. It is very significant that Congress expressed its will in the MEJA that not all persons who commit crimes on "lands" used by the United States in the sovereign territory of foreign nations are to be subject to the MEJA. Specifically, 18 USC §3267(1)(C) excludes from the ambit of the MEJA any person who is "a national of or ordinarily resident in the host nation." Notwithstanding this clear intent of Congress, the Ninth Circuit majority has interpreted 18 USC §7(3) to include the very persons that Congress has said shall not be subject to United States jurisdiction under the MEJA - namely, nationals and residents of the host nation. Query if the Ninth Circuit may disregard such a clear expression of congressional will in interpreting 18 USC §7(3)?

CONCLUSION

For the foregoing reasons, this Petition ought to be GRANTED.

Respectfully submitted,

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App. 1

(This opinion is reported at 232 F.3d 1166. Page references to the reported decision are imbedded in the opinion for reference.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee,
v.
Clifton S. COREY, Defendant-Appellant.

No. 99-10232
D.C. No. CR-96-01019-MLR

Appeal from the United States District Court for the District of Hawaii; David A. Ezra, Chief District Judge, Presiding*.

Argued and Submitted March 14, 2000
San Francisco, California

Filed November 20, 2000

Before: KOZINSKI, KLEINFELD and McKEOWN, Circuit Judges.

Judge David A. Ezra presided over pretrial motions in this case, granting the Government's Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law During Trial, *United States v. Corey*, No. 96-01019-DAE (D.Haw. July 7, 1997), that Corey challenges on this appeal.

*1169 KOZINSKI, Circuit Judge.

We consider whether the federal courts have jurisdiction over a criminal case charging a United States citizen with offenses committed at United States installations abroad.

I

Clifton S. Corey, a United States citizen, lived abroad with his family while working for the U.S. Air Force as a civilian postmaster. From 1993 to 1996, Corey ran the post office at the American Embassy in Manila, the Philippines, and for several years before, he managed the office at the U.S. Air Force Base at Yokota, Japan. In 1996, Corey's stepdaughter, Anna, told her doctor that her stepfather had forced her to engage in sexual intercourse with him for the previous five years, starting when she was fifteen. After an investigation, the government charged Corey with aggravated sexual abuse and sexual abuse in violation of 18 U.S.C. § 2241(a) and 2242(1).[1] The first trial

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[1] Subsections 2241(a) and 2242(1) provide respectively that:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act--
> (1) by using force against that person; or
> (2) by threatening or placing that other person in fear that any person will be subjected to death,

(continued...)

ended in a hung jury but, after a second trial, Corey was convicted on eight of eleven counts and sentenced to 262 months in prison. On appeal, he challenges the district court's jurisdiction and also raises a variety of trial errors. We address the jurisdictional issue in this opinion and the remaining issues in a memorandum disposition filed concurrently.

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[1](...continued)

serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both....

18 U.S.C. § 2241(a).

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping)[,] ...

. . . . .

or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 2242(1).

II

Prior to trial, the district court granted the government's motion to preclude Corey from contesting jurisdiction.[2] Corey argued then, as he does now, that crimes committed on foreign soil fall outside the reach of 18 U.S.C. §§ 2241 and 2242. Both provisions proscribe sexual assault within the "special maritime and territorial jurisdiction of the United States," a phrase defined by 18 U.S.C. § 7. While Corey lived in Japan, he and his family resided on the Yokota Air Force Base. In the Philippines, they lived at Lopez Court, a private apartment building rented by our embassy for the use of its employees. The government charges that the sexual abuse occurred in each of these residences. Corey argues that neither residence falls within the special jurisdiction of the United States.

The "special maritime and territorial jurisdiction of the United States" includes:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

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[2] The government filed this somewhat unusual motion in order to present the jurisdictional question to the district court prior to trial.

18 U.S.C. § 7(3). This provision tracks its origin to 1790, yet, at the time this case was brought, only two courts had addressed *1170 whether it applied to lands within the territory of a foreign nation. *See United States v. Erdos*, 474 F.2d 157 (4th Cir.1973); *Witten v. Pitman*, 613 F.Supp. 63, 65-66 (S.D.Fla.1985); *see also Talbott v. United States ex rel. Toth*, 215 F.2d 22, 27 (D.C.Cir.1954), *rev'd sub nom. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955). Two other courts have since ruled on the issue. *See United States v. Gatlin*, 216 F.3d 207 (2d Cir.2000); *United States v. Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y.2000).

We review de novo the district court's assertion of jurisdiction. *See* United States v. Vasquez-Velasco, 15 F.3d 833, 838-39 (9th Cir.1994).

III

A. Congress may enforce its laws beyond the territorial boundaries of the United States. *See EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991); *Vasquez-Velasco*, 15 F.3d at 839 ("Generally there is no constitutional bar to the extraterritorial application of United States penal laws." (citations omitted)). Whether Congress has in fact exercised such power is a question of statutory construction, normally subject to the rule " 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949)); *see also Sale v. Haitian Ctrs. Council, Inc.*,

509 U.S. 155, 188, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested.").

For most legislation, the presumption against extraterritoriality makes perfect sense. First, "Congress generally legislates with domestic concerns in mind," *Smith v. United States*, 507 U.S. 197, 204 n. 5, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993), so courts can infer from congressional silence that the legislature meant to regulate only activities within the nation's borders. Second, the rule ensures that we do not precipitate "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227. The Supreme Court has invoked this territorial presumption in numerous cases involving the scope of broad regulatory statutes. *See, e.g., Sale*, 509 U.S. at 173, 113 S.Ct. 2549 (Immigration and Nationality Act); *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 (Title VII); *Filardo*, 336 U.S. at 285, 69 S.Ct. 575 (federal overtime law); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357, 29 S.Ct. 511, 53 L.Ed. 826 (1909) (Sherman Act). In all of these cases, the Court held that Congress expected that its regulations would end at the national borders.

The territorial presumption is thus based on the common-sense inference that, where Congress does not indicate otherwise, legislation dealing with domestic matters is not meant to extend beyond the nation's borders. But the presumption does not apply where the legislation implicates concerns that are not inherently domestic. For instance, in *United States v. Bowman*, 260 U.S. 94, 98, 43 S.Ct. 39, 67 L.Ed. 149 (1922), the Supreme Court held that the territorial presumption does not govern the interpretation of criminal statutes that, by their

nature, implicate the legitimate interests of the United States abroad. *Bowman* concerned fraud committed on a U.S. vessel outside the territorial waters of the United States. Although the statute there did not contain an extraterritoriality provision, the Court concluded that it covered the conduct in question. *See also Vasquez-Velasco*, 15 F.3d at 839 n. 4 (applying *Bowman* to violent crimes associated with international drug trafficking); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir.1991) (applying *Bowman* to accessory after the fact to the murder of a DEA agent in Mexico). Thus, courts do not apply the territorial presumption where it is not a reliable guide to congressional intent.

***1171** When Congress is considering the scope of federal jurisdiction, its attention is focused precisely on how far U.S. law should reach. Unlike ordinary domestic statutes, jurisdictional statutes inherently present the question of how far Congress wishes U.S. law to extend. There is therefore no reason to presume that Congress did, or did not, mean to act extraterritorially. Rather, we agree with *Bin Laden* that "[w]hen presented with the task of interpreting jurisdictional statutes such as [subsection] 7(3), courts should simply employ the standard tools of statutory interpretation...." 92 F.Supp.2d at 206 n. 32.

Applying the territorial presumption to subsection 7(3) would be a mistake for another reason: Land subject to subsection 7(3) is not "extraterritorial," as the Supreme Court has defined the term. In *Aramco*, the Court described territorial jurisdiction as including "places over which the United States has sovereignty or has some measure of legislative control." *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 (internal quotation marks omitted). Subsection 7(3) does not purport to regulate conduct

within territory over which the United States lacks "some measure of legislative control"; by its terms, it extends only to areas within the concurrent or exclusive jurisdiction of the United States. *See Environmental Defense Fund v. Massey*, 986 F.2d 528, 533 (D.C.Cir.1993) ("[W]here the U.S. has some real measure of legislative control over the region at issue, the presumption against extraterritoriality is much weaker."). Thus, even more than ordinary jurisdictional statutes, subsection 7(3) is a poor candidate for the territorial presumption.

Because foreign lands covered by subsection 7(3) are, by definition, under the legislative control of the United States, the second policy supporting the territorial presumption-the desire to avoid "unintended clashes" with foreign powers, *see Aramco*, 499 U.S. at 248, 111 S.Ct. 1227--is also inapplicable. Legislative jurisdiction over the territory of a foreign power can only be acquired through that nation's consent--or by conquest. *See, e.g., In re Ross*, 140 U.S. 453, 464, 11 S.Ct. 897, 35 L.Ed. 581 (1891) ("When ... the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree...."). Either way, subsection 7(3) will apply only where the foreign sovereign does not or cannot object to the exercise of such jurisdiction. This case illustrates the point: Neither the Philippines nor Japan has protested the assertion of jurisdiction over Corey. Quite the contrary, both countries have abjured any interest in prosecuting Corey, no doubt recognizing that the case involves internal U.S. matters.

But, even if the presumption were applicable, the text of section 7 would clearly rebut it. The language and structure of the statute reflect a legislative purpose to

reach places that lie well beyond U.S. borders. The *special* maritime and territorial jurisdiction of the United States extends by definition beyond *ordinary* land and seas. Taken as a whole, 18 U.S.C. § 7 extends the jurisdiction of the federal criminal laws to areas where American citizens and property need protection, yet no other government effectively safeguards those interests. Congress unmistakably had foreign locales in mind when it set about defining that jurisdiction. Put subsection 7(3) aside for the moment. *Every* other subsection mentions spaces outside the fifty states. Section 7 reaches vessels sailing on the high seas, subsection 7(1), or on international waterways, subsection 7(2); islands prized for their rich bird droppings, subsection 7(4); airplanes flying the friendly skies, subsection 7(5); NASA spaceships rocketing towards Mars, subsection 7(6); Antarctica, subsection 7(7); and foreign ships coming to America, subsection 7(8). Section 7 as a whole extends the jurisdiction of the United States to the ends of the earth (and beyond). We construe subsection 7(3) against the extraterritorial backdrop of its neighbors.

*1172 The history of the statute, discussed below, *see* pp. 1173-76 *infra*, confirms that Congress intended precisely this interpretation. We conclude therefore that subsection 7(3) applies to Americans in all territory, wherever situated, that is acquired for the use of the United States and under the exclusive or concurrent jurisdiction of the federal government.

B. Our conclusion that subsection 7(3) applies to territory outside the borders of the fifty states agrees with that of the Fourth Circuit. *See United States v. Erdos*, 474 F.2d 157 (4th Cir.1973) (holding that subsection 7(3) grants

territorial jurisdiction over the American embassy in Equatorial Guinea). Two circuits in addition to our own have previously repeated *Erdos*'s holding, albeit in dicta. *See Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir.1992) (noting that section 7 would permit U.S. criminal jurisdiction over the commission of crimes at Guantanamo Bay), *vacated on other grounds sub nom., Sale*, 509 U.S. 918, 113 S.Ct. 3028, 125 L.Ed.2d 716; *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841- 42 & n. 11 (D.C.Cir.1984) (recognizing but distinguishing *Erdos*); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588-89 (9th Cir.1983) (same); *see also Agee v. Muskie*, 629 F.2d 80, 111 (D.C.Cir.1980) (MacKinnon, J., dissenting) (relying on *Erdos* and finding that "[b]y virtue of [subsection 7(3)] the United States Embassy in Tehran, Iran is within the 'special' territorial jurisdiction of the United States"), *rev'd on other grounds sub. nom, Haig v. Agee*, 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

Recently, however, in a case almost identical to ours, the Second Circuit held that subsection 7(3) applies only to lands acquired within the territorial borders of the United States. *See United States v. Gatlin*, 216 F.3d 207 (2d Cir.2000). The defendant in *Gatlin*, an American civilian on a military base in Germany, impregnated his thirteen-year-old stepdaughter while his wife was on duty in Bosnia. Federal prosecutors charged Gatlin with engaging in sexual acts with a minor within the special territorial jurisdiction of the United States. The district court ruled it had jurisdiction and accepted Gatlin's conditional guilty plea. On appeal, the Second Circuit concluded that the territorial presumption, fortified by a reading of

legislative history, prevented subsection 7(3) from applying abroad.

We are not persuaded by the Second Circuit's reasoning. *Gatlin* examined subsection 7(3)'s statutory predecessors and concluded that Congress drafted the provision without any inkling that it would be applied extraterritorially.[3] The court emphasized that earlier

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[3] *Gatlin* also found that Congress's failure to fill the supposed "jurisdictional gap" over civilians on military bases confirmed a legislative belief in the existence of that jurisdictional gap. *See Gatlin*, 216 F.3d at 209, 221-22 & n. 23. We doubt whether the beliefs of subsequent legislatures have *any* bearing upon the interpretation of a statute already on the books. But since the only circuit to consider the issue concluded that jurisdiction exists, legislative inaction over the twenty-seven years since *Erdos* would suggest, if anything, congressional acquiescence in the Fourth Circuit's decision.

The dissent makes much of the fact that Congress responded to *Gatlin* by enacting a bill to remove any doubt over American jurisdiction. *See* Dissent at 1197 (citing Military Extraterritorial Jurisdiction Act of 2000, S. 768, 106th Cong. (2000)). But if this gap has existed for decades, as the dissent purports, then why did Congress close it only now? The answer, of course, is that so long as the gap only existed in law reviews, Congress had no need to resolve the ambiguity. But *Gatlin*'s novel interpretation of subsection 7(3) prodded Congress to remove the circuit split. In any event, we fail to see how recent legislative action can help us interpret a law that

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versions of subsection 7(3), enacted in 1790 and 1909, criminalized acts within the "exclusive" jurisdiction of the United States. *See* Act of March 4, 1909, ch. 321, § 272, 35 Stat. 1088 (defining territorial jurisdiction to include territory within the "exclusive jurisdiction" of the United States); Act of April 30, 1790, ch. 9, § 3, 1 Stat. 112 (proscribing crimes ***1173** within the "sole and exclusive jurisdiction" of the United States). Because the United States had exclusive jurisdiction only over domestic territory, *Gatlin* reasoned Congress could not have intended the laws to apply abroad. *See Gatlin*, 216 F.3d at 218 ("[T]he limitation of jurisdiction to lands over which the United States exercises 'exclusive' jurisdiction again makes plain that [the 1909 statute] did not mean to refer to land in foreign territory."); *id.* at 216-17 ("The notion that the United States could exercise *exclusive* legislative jurisdiction over lands in a foreign nation" was "virtually inconceivable in 1790.").

Nor, said *Gatlin*, did Congress intend to apply the statute extraterritorially in 1940, when it expanded its coverage to areas within the concurrent jurisdiction of the United States. *See* Act of June 11, 1940, ch. 323, 54 Stat. 304. "[W]hat little legislative history there is of the 1940 Act," *Gatlin*, 216 F.3d at 219, suggested to *Gatlin* that Congress added concurrent jurisdiction only to expand the reach of federal law to domestic highways, national parks and other areas where the federal and state governments exercised concurrent jurisdiction. *See id.*

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[3](...continued)
has been on the books in one form or another since 1790.

(citing H.R.Rep. No. 76-1623, at 2 (1940); S.Rep. No. 76-1708, at 1 (1940)). *Gatlin*'s investigation of the legislative history behind these three acts uncovered no evidence that Congress intended subsection 7(3) to apply to lands located beyond the borders of the various states.

The linchpin of *Gatlin*'s analysis was its assumption that it would have been "virtually inconceivable" for Congress in the eighteenth and nineteenth centuries to speak of the United States having exclusive jurisdiction outside the country's territorial limits. *Gatlin*, 216 F.3d at 217.[4] Therefore, when Congress used "exclusive jurisdiction" in subsection 7(3), the term could only have referred to territory the United States acquired from the states. But nineteenth century Americans were hardly so parochial. While they may have believed that, so long as territory remained unequivocally foreign, it lay outside the jurisdiction of the United States, they were well aware that territory could change hands, and the United States could gain exclusive jurisdiction over territory that other countries claimed as their own. *See Jones v. United States*, 137 U.S. 202, 212, 11 S.Ct. 80, 34 L.Ed. 691 (1890) ("By the law of nations, recognized by all civilized States,

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[4] *Gatlin*'s skepticism presumably extended only to jurisdiction over foreign territory. Nations have long enjoyed the right to exercise jurisdiction over acts committed outside of their own territory by their nationals. *See* Henry Wheaton, *Elements of International Law*, § 113 (James Brown Scott ed., Clarendon Press 1936) (Richard H. Dana, Jr. ed., 8th ed. 1866) (recognizing that the state's judicial power extended to the punishment of offenses "by its subjects, wheresoever committed").

dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest...."); *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42, 10 S.Ct. 792, 34 L.Ed. 478 (1890) ("The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty."); *American Ins. Co. v. 365 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 540, 7 L.Ed. 242 (1828) ("[The] government possesses the power of acquiring territory, either by conquest or by treaty."). Over the course of the nineteenth century, the United States purchased Louisiana from France; won Florida from Spain; defeated numerous Indian nations; annexed the Republic of Texas; divided Oregon with the British; conquered Mexico's California possessions; purchased Alaska from Russia; and annexed Hawaii. This was clearly not a time when Americans thought of their borders as static or of foreign territory as sacrosanct.

The original 1790 Act provided basic criminal laws for lands outside the jurisdiction of any other sovereign. *See, e.g., Watts v. United States*, 1 Wash. Terr. 288, 297-98, 1870 WL 2118 (Wash.1870) ("The intent seems ... to have been to prevent *1174 that detestable crime [murder] from finding harbor and impunity in places where no other law than that of the United States could reach to punish."). The act criminalized murder, larceny and other crimes committed "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." 1790 Act, 1 Stat. at 113. That provision applied not only to the various federal facilities enumerated, but also to "any other place or district of country" not subject to an alternate system of laws. *Id.*

As the United States acquired new possessions, Congress extended federal criminal jurisdiction with the boundaries of the young republic. Special provisions of the organic acts of Louisiana and Florida applied the 1790 Act to land not subject to the territorial governments in those territories. *See* An Act for the Establishment of a Territorial Government in Florida, ch. 13, § 9, 3 Stat. 654 (1822); An Act Erecting Louisiana into Two Territories, ch. 38, § 7, 2 Stat. 283 (1804). In 1817, Congress provided that U.S. territory remaining under Indian control nevertheless lay within the "sole and exclusive" criminal jurisdiction of the United States. *See* An Act to Provide for the Punishment of Crimes and Offences Committed Within the Indian Boundaries, ch. 92, § 1, 3 Stat. 383 (1817). The Indian Intercourse Act subsequently defined such territory to include all of the Louisiana territory except the states of Missouri, Louisiana and the territory of Arkansas. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers, ch. 161, § 1, 4 Stat. 729 (1834). As the United States expanded across the continent, the Supreme Court extended that "sole and exclusive" jurisdiction to *all* the unsettled territories in the American west. *See Ex parte Crow Dog*, 109 U.S. 556, 560-62, 3 S.Ct. 396, 27 L.Ed. 1030 (1883) (holding that "Indian country" included all land in the United States not organized into states or self-governing territories and that the Dakota territory lay within U.S. jurisdiction); *see also Cook v. United States*, 138 U.S. 157, 180, 11 S.Ct. 268, 34 L.Ed. 906 (1891) (holding that the Public Land Strip, now the Oklahoma panhandle, lay within federal criminal jurisdiction). Thus, in the nineteenth century, the special territorial jurisdiction of

the United States included vast expanses of territory lying beyond the boundaries of the states.

Congress's regulation of the Indian territory demonstrates the error in presuming that nineteenth-century Americans believed territorial jurisdiction was an all-or-nothing concept. Although the Indian territory was part of the United States, the federal government respected the Indian tribes' political claims over the lands within their possession. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16-17, 8 L.Ed. 25 (1831) (describing the tribes as "domestic dependent nations" that had an "unquestionable" right to lands within their possession yet whose territory was nonetheless under the sovereignty of the United States). Congress recognized this concurrent jurisdiction by exempting from federal criminal jurisdiction crimes committed "by one Indian against the person or property of another Indian," leaving such crimes within the tribes' exclusive jurisdiction. Indian Intercourse Act, § 25, 4 Stat. at 733. This shared jurisdictional scheme accommodated the needs of the concurrent authorities over the Indian territory, resembling in some respects the agreements worked out by the United States with the host countries in this case. *See* pp. 1181-83 *infra*.

In extending the reach of United States jurisdiction, Congress did not stop with the continental possessions of the nation. The Guano Islands Act of 1856 asserted criminal jurisdiction over islands claimed by Americans for their guano deposits. *See* An Act to Authorize Protection to Be Given to Citizens of the United States Who May Discover Deposits of Guano, ch. 164, § 6, 11 Stat. 119, 120 (1856). The act gave the President the discretion to claim faraway islands as U.S. territory, *see id.* § 1, 11

Stat. at 119, and then granted federal *1175 courts criminal jurisdiction over the islands to the full extent of their jurisdiction over crimes committed on the high seas. *See id.* § 6, 11 Stat. at 120. When the United States claimed territory far beyond its borders, Congress promptly extended federal jurisdiction to those areas under U.S. control.

Contrary to *Gatlin*'s suggestion, the United States at times *did* assert criminal jurisdiction over territories claimed by another sovereign. In *Jones*, 137 U.S. at 212, 11 S.Ct. 80, the defendant sought to evade prosecution by claiming that a murder on the guano island of Navassa was not under U.S. jurisdiction, because the island was claimed by the government of Haiti. Likewise, in *Watts*, 1 Wash. Terr. 288, the defendant claimed that San Juan Island, off the coast of Washington, was not within the "sole and exclusive jurisdiction of the United States," because Great Britain claimed title to the land as well. In both cases, the courts rejected the jurisdictional challenge on the ground that questions of sovereignty were the province of the other branches of government. *See Jones*, 137 U.S. at 212, 11 S.Ct. 80 ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by [the political branches] conclusively binds the judges...."); *Watts*, 1 Wash. Terr. at 296 ("Since ... the United States claims San Juan Island, we must treat it as under the general laws of the United States...."). Courts had no hesitation about treating these territories as within our exclusive jurisdiction, even though foreign governments claimed the territory as their own.

When in 1909, Congress placed these various jurisdictional provisions within a single statute, it understood criminal jurisdiction to extend to all lands claimed by the United States, without regard to whether they were within a particular state or even within the continental United States. Congress declined to assert jurisdiction over territories subject to the more comprehensive criminal codes of the states or self-governing territories. But it showed no intent to limit jurisdiction on the basis of geography alone. We see no reason then to presume that when, in 1940, Congress extended criminal jurisdiction to those lands under the concurrent authority of the United States, it intended to limit the reach of subsection 7(3) to areas under the concurrent authority of the states, but not those under the concurrent authority of other sovereigns.

Although *Gatlin* purported to rely on the legislative history of subsection 7(3), there is, in fact, very little in the legislative record that speaks to the question presented to us. *Gatlin* rather, relies on its reading of the historical record, its understanding of what the legislators must have assumed when they used particular words and phrases. We believe that *Gatlin* reached the wrong conclusion by failing to take into account our nation's history of rapid territorial expansion during the late eighteenth and nineteenth centuries. *Gatlin* also erred, in our view, by considering subsection 7(3) in isolation from its neighboring subsections because the court believed "most subsections of § 7 were enacted separately by Congress and have their own legislative histories." *Gatlin*, 216 F.3d at 216 n. 11.

But what history shows is that Congress never understood the provisions of section 7 to be separate

fragments of jurisdiction. Indeed, when Congress extended federal criminal jurisdiction, it did so by reference. The Indian Intercourse Act criminalized actions in Indian territory that would be crimes if "committed within any place or district of country within the sole and exclusive jurisdiction of the United States." Indian Intercourse Act, § 25, 4 Stat. at 733. Likewise, the Guano Islands Act provided that crimes on the guano islands would be "punished according to the laws of the United States relating to such ships or vessels and offences on the high seas." Guano Islands Act, § 6, 11 Stat. at 120. This history demonstrates that Congress understood these discrete statutes as extensions of the fundamental principle articulated ***1176** in the 1790 Act: The federal government had an obligation to provide basic criminal laws for territory over which it had control.

Gatlin holds that if Congress wanted to extend the jurisdiction of the federal courts beyond the borders of the collective states, it had to express its intent in *each* relevant subsection. *See Gatlin*, 216 F.3d at 216 n. 11 ("[S]ubsections like § 7(7) confirm that Congress knows how to legislate extraterritorially when it so desires."). We see no reason to impose such a burden on Congress. The Supreme Court found that Congress rebuts the territorial presumption simply by demonstrating that it drafted the statute with extraterritorial concerns in mind. *See Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949) (presumption overcome when Congress demonstrates an "intention other than the normal one"). The Second Circuit would require Congress to engage in the pointless exercise of repeating its designs throughout every subsection of a section clearly devoted to extending

the reach of U.S. law to all places under the dominion of the United States.

And to what end? The Second Circuit was concerned that applying our law to U.S. possessions abroad might invite the "unintended clashes between our laws and those of other nations" that the territorial presumption helps avoid. *Gatlin*, 216 F.3d at 216 n. 11 (quoting *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)). But the Constitution leaves it to the political branches, not the courts, to determine the territory over which the United States enjoys legislative jurisdiction. *See, e.g., First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (noting that the political branches and not the judiciary determine whether the United States exercises sovereignty over territory); *Jones*, 137 U.S. at 212, 11 S.Ct. 80 (same). "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936) (internal quotation marks omitted). By bringing this action against Corey, the Executive has asserted U.S. jurisdiction over Americans in the foreign territories under U.S. control; any objections from foreign governments will be directed to our State Department, which will then decide whether our national interest is served by persisting. It is not our province to second-guess this decision.

Thus, construing subsection 7(3) as applying only to federal lands within the United States serves neither congressional intent nor American foreign policy. All it

does is hand a get-out-of-jail-free card to American civilians who violate U.S. law while stationed abroad.[5]

IV

We next consider whether the areas in this case--the Yokota Air Force Base and Lopez Court--are lands "reserved or acquired for the use of the United States" and "under the exclusive or concurrent jurisdiction thereof" for purposes of 18 U.S.C. § 7(3).

A. "Reserved or Acquired for the Use of the United States"

The meaning of "reserved or acquired for the use of the United States" is plain enough. Courts have demonstrated their faith in the words' clarity by skipping over them without explication. *See United States v. Blunt,* 558 F.2d 1245, 1246 (6th Cir.1977); *United States v. Erdos,* 474 F.2d 157, 159 (4th Cir.1973); *1177*United States v. Bin Laden,* 92 F.Supp.2d 189, 204- 06 (S.D.N.Y.2000); *Witten v. Pitman,*

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[5] The *Gatlin* panel recognized as much when it took the unusual step of sending a copy of its opinion to the relevant House and Senate committees with the implicit message that Congress ought to correct the problem legislatively. *See Gatlin,* 216 F.3d at 223. *Gatlin* thus acknowledged that there is no real conflict between U.S. and foreign law when the United States prosecutes a U.S. citizen--who is a government employee--for crimes against a U.S. national on territory under the dominion of the United States.

613 F.Supp. 63, 65-66 (S.D.Fla.1985). Before we do the same, we note that these words do not explicitly refer to any particular estate in the land in question. *See Blunt*, 558 F.2d at 1246-47 (finding subsection 7(3) to apply to a federal prison without regard to whether the United States had title to the land). There is no requirement that the United States be an owner, or even an occupant, so long as the land has been set aside for the use of an instrumentality of the federal government.

By this standard, there is not much question that the Yokota Air Force Base has been acquired for the use of the United States. The United States first occupied the territory upon which the base is located following Japan's surrender in World War II. In negotiating Japan's return to self-government, the Japanese government agreed that the United States would retain control over certain areas of the country, including the territory on which the base is located. *See* Preliminary Working Group Under the Exchange of Notes Between the Governments of the United States and Japan on 28 February 1952, Minutes of the Eighth Meeting, at 20 (Apr. 3, 1952). For almost half a century, the United States has used the Japanese land in question in the same manner as it uses American land on which are located domestic military installations.

Likewise, the United States has acquired Lopez Court for its own use. The State Department leased the apartment building from a private landlord for the purpose of housing our embassy personnel. *See* Lease No. 723574, Gov't Ex. 5, *United States v. Corey*, No. 96-01019-DAE (June 23, 1997); Lease No. S-314-FBO-136, Gov't Ex. 6, *Corey*, No. 96-01019-DAE. The government furnishes and maintains the apartments, and the lease runs without regard to the residence of a particular employee. *See*

Transcript of Testimony of Judith A. Senykoff, Housing Officer at the U.S. Embassy in Manila, *Corey*, No. 96-01019-DAE, at 42. In addition to signing the lease, the government pays rent and utilities, and provides security for the buildings. *See id.* at 40. Lopez Court was not Corey's private residence; it was an apartment acquired by the State Department for governmental use.[6]

Thus, both the Yokota Air Force Base and Lopez Court are lands "reserved or acquired for the use of the United States" within the meaning of subsection 7(3).

B. "Exclusive or Concurrent Jurisdiction"

We next consider whether the United States exercises "exclusive or concurrent" jurisdiction over the Air Force Base and Lopez Court. The jurisdiction in question is not that of the federal courts. If it were, subsection 7(3) would be trivial, if not tautological, defining a subset of territory over which the courts already had jurisdiction. The provision instead refers to "legislative jurisdiction," *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (Scalia, J., dissenting); *Aramco*, 499 U.S. at 253, 111 S.Ct. 1227, or what

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[6] The dissent presumes that section 7(3) would extend federal criminal jurisdiction to all property leased by the United States abroad. *See* Dissent at 1195. But section 7(3) also requires that the property be within the exclusive or concurrent jurisdiction of the federal government. Section 7(3) will not apply to all leased properties, but only to those properties over which the United States has obtained legislative jurisdiction by treaty or otherwise.

international lawyers understand as the "jurisdiction to prescribe." *Restatement (Third) of the Foreign Relations Law of the United States* § 401 (1987). This legislative jurisdiction, as defined by the *Restatement*, is the state's authority "to make its law applicable to the activities, relations, or status of persons." *Id.; see also* Myres S. McDougal & W. Michael Reisman, *International Law in Contemporary Perspective* 1273 (1981) ("The initial assertion of a competence to *prescribe* is the claim to project policies regulating actors *1178 or activities that is manifested either in legislative enactments or in prescriptions developed as customary law."). Thus, subsection 7(3) grants the courts jurisdiction over those territories over which the government enjoys regulatory authority.

This definition under international law conforms with the Fourth Circuit's interpretation of subsection 7(3). *Erdos* described this standard as one of the "practical usage and dominion" enjoyed by the United States over "the embassy or other federal establishment." *Erdos*, 474 F.2d at 159. Under this test, the court considers whether the United States enjoys such control over the area that the law should constructively regard it as United States territory. *Erdos* found this standard met by United States dominion over the embassy territory in Equatorial Guinea. Likewise, the Sixth Circuit adopted this test in finding jurisdiction under subsection 7(3) over a federal prison in Kentucky. *See Blunt*, 558 F.2d at 1246-47 (rejecting the defendant's claim that the United States must establish chain of title in order to place the land within the special territorial jurisdiction of 7(3)). This "practical dominion" standard reflects the appropriate test for determining United States jurisdiction under subsection 7(3).

Under subsection 7(3), U.S. territorial jurisdiction need not be exclusive. We have recognized that embassy property "remains the territory of the receiving state, and does not constitute territory of the United States." *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir.1983).[7]

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[7] *McKeel* continued: "Thus, United States embassies are not within the territorial jurisdiction of the United States." *McKeel*, 722 F.2d at 588 (citing *Meredith v. United States*, 330 F.2d 9, 10-11 (9th Cir.1964)). That observation should not be understood as holding that the embassy lies outside the concurrent jurisdiction of the United States under subsection 7(3). The question before *McKeel* was whether torts committed at the embassy, namely Iran's seizure of U.S. embassy personnel, "occurr [ed] in the United States" for the purposes of the Foreign Sovereign Immunities Act (FSIA). *Id.* at 587. Thus, the issue was really whether the embassy was under the *exclusive* territorial jurisdiction of the United States.

McKeel concluded that torts committed on embassy property were not torts "occurring in the United States," but nonetheless accepted that "United States embassies are subject to the jurisdiction of the United States for certain purposes." *Id.* at 587-88. *McKeel*'s reliance on *Meredith* supports this reading of *McKeel*, since *Meredith* held only that embassy property lay within the territory of the foreign country. *See Meredith*, 330 F.2d at 10-11 (U.S. embassy in Thailand is "in a foreign country" for purposes of the Federal Tort Claims Act). Likewise, this understanding is the only one consistent with the Supreme Court's subsequent recognition in *Aramco* that

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Likewise, the Status of Forces Agreement preserves Japan's jurisdiction over the Yokota Air Force Base; even though used by the United States for its purposes, the land on which the base is located continues to be part of Japan. *See* Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan (SOFA), art. II, Jan. 19, 1960, 11 U.S.T. 1652. But acknowledging the claims of the foreign government does not determine whether the United States exercises concurrent jurisdiction over that territory--particularly with regard to the actions of its own citizens.

Bin Laden concluded that concurrent territorial jurisdiction over embassy property would violate international law. *See Bin Laden*, 92 F.Supp.2d at 213-14. *Bin Laden* ruled that embassy property fell outside the United States's special jurisdiction, and so dismissed a murder charge against the terrorists who bombed the American embassies in Kenya and Tanzania.[8] Federal

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[7](...continued)
U.S. territorial jurisdiction includes "places over which the United States has sovereignty or has *some measure of legislative control.*" *Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 (emphasis added).

[8] *Bin Laden* did hold that the terrorists might be prosecuted for other crimes that it found fell within the *Bowman* exception, including bombing United States
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courts have long recognized *1179 that " 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.' " *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804) (Marshall, C.J.)). If it were true that concurrent territorial jurisdiction violated international law, then we would arguably have to conclude that subsection 7(3) did not apply to the lands at issue in this case.[9]

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[8](...continued)
property under 18 U.S.C. § 844(f)(1); killing in connection with the destruction of such property under 18 U.S.C. § 844(f)(3); and killing a federal officer in the line of duty under 18 U.S.C. § 1114. *See Bin Laden*, 92 F.Supp.2d at 198-204.

[9] We use "arguably" deliberately. Even if concurrent territorial jurisdiction were not permissible under international law, the *Charming Betsy* principle would probably not apply for two independent reasons. First, the Supreme Court has never invoked *Charming Betsy* against the United States in a suit in which it was a party. *Charming Betsy* itself concerned a private dispute where the Court had to determine whether the ship could be seized for violating the American embargo against France. Faced with the choice, the Court interpreted the relevant statute so as to avoid embroiling the nation in a
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[9](...continued)
foreign policy dispute unforeseen by either the President or Congress. *See Charming Betsy*, 6 U.S. at 118. These concerns are obviously much less serious where the interpretation arguably violating international law is urged upon us by the Executive Branch of our government. When construing a statute with potential foreign policy implications, we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States. *See* p. 1176 *supra*.

Charming Betsy is likely inapplicable in this case for a second, separate reason: There is no doubt that the United States may exercise jurisdiction over American nationals living abroad, regardless of where the crime is committed. *See Blackmer v. United States*, 284 U.S. 421, 437 n. 2, 52 S.Ct. 252, 76 L.Ed. 375 (1932) ("The law of Nations does not prevent a State from exercising jurisdiction over its subjects traveling or residing abroad, since they remain under its personal supremacy." (internal quotations marks omitted)); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C.Cir.1984). Thus, interpreting subsection 7(3) to include jurisdiction over Corey would not violate international law. To be sure, questions might arise if the same interpretation of subsection 7(3) authorized the government to prosecute a foreign citizen in a subsequent case, but we can presume that the Executive Branch would not precipitate an international conflict by bringing such a prosecution. Even if it did, the courts could avoid the conflict by

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But the *Charming Betsy* rule does not apply because there is no conflict with international law to avoid. Concurrent jurisdiction is well-recognized in international law. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines,* 731 F.2d 909, 922 (D.C.Cir.1984) (stating that "two or more states may have legitimate interests in prescribing governing law over a particular controversy"); *Restatement, supra,* §§ 402-03. We have recognized that "[t]he law of nations permits the exercise of criminal jurisdiction by a nation under five general principles: territorial, national, protective, universality, and passive personality." *United States v. Felix-Gutierrez,* 940 F.2d 1200, 1205 (9th Cir.1991). These distinct fonts of power often leave two nations with concurrent authority over a particular controversy, and American courts have on numerous occasions managed conflicts arising when two nations had authority over the same issue. *See, e.g., Romero v. International Terminal Operating Co.,* 358 U.S. 354, 381-83,

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[9](...continued)
construing the subsection with reference to the principle that "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 815, 113 S.Ct. 2891, 125 L.Ed.2d 612 (Scalia, J., dissenting); *see also Romero v. International Terminal Operating Co.,* 358 U.S. 354, 381-84, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959) (interpreting the Jones Act not to apply to a tort committed against a Spanish sailor on Spanish vessel in American territorial waters).

79 S.Ct. 468, 3 L.Ed.2d 368 (1959) (Spanish seaman on Spanish ship injured in U.S. waters); *Lauritzen v. Larsen*, 345 U.S. 571, 577-83, 73 S.Ct. 921, 97 L.Ed. 1254 (1953) (Danish seaman on Danish ship injured ***1180** in Cuban waters); *Sabena*, 731 F.2d at 921-22 (antitrust case litigated in both American and English courts); *Timberlane Lumber Co. v. Bank of America*, N.T. & S.A., 549 F.2d 597, 614 (9th Cir.1976) (antitrust violation in Honduras with effects in the United States). Thus, concurrent jurisdiction as such raises no eyebrows among international lawyers.

Bin Laden theorized that concurrent jurisdiction, by which it meant concurrent territorial jurisdiction, was inconsistent with the very notion of sovereignty. *See Bin Laden*, 92 F.Supp.2d at 213-14. But the American experience belies the notion that the atom of sovereignty cannot be split. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) (Kennedy, J., concurring). There is no question that domestic lands may fall under the concurrent jurisdiction of the state and federal governments. *See North Dakota v. United States*, 495 U.S. 423, 429 n. 2, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990) ("A territory under concurrent jurisdiction is generally subject to the plenary authority of both the Federal Government and the State....").

Bin Laden suggested that concurrent territorial jurisdiction was only possible in the United States because the individual states were not "independent sovereign nations, but rather political sub-units of the United States." *Bin Laden*, 92 F.Supp.2d at 214. Although the states are not independent nations, they are hardly "political sub-units" of the federal government. *See, e.g., Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2247, 144 L.Ed.2d 636 (1999) (The

states retain "the dignity and essential attributes inhering" in sovereignty."); *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n. 15, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) ("The Constitution specifically recognizes the States as sovereign entities."); *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.").

Two sovereignties may exercise concurrent jurisdiction when their relationship is regulated by law. In the United States, the Constitution permits the state and federal governments to exercise concurrent jurisdiction without undue interference. While the Supremacy Clause normally resolves any conflict in favor of the federal government, that is not always the case. *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000). What matters is not whose law trumps in particular situations but that there is a law-driven means for resolving any conflict.

The principle applies no less in the international domain. Independent nations cede their exclusive control over their territory through treaties, and the terms of those agreements govern that concurrent authority. *See Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 381-83, 69 S.Ct. 140, 93 L.Ed. 76 (1948) (recognizing that the United States may exercise jurisdiction over land placed under its control by treaty even though the territory remains part of the United Kingdom); *In re Ross*, 140 U.S. 453, 464, 11 S.Ct. 897, 35 L.Ed. 581 (1891) ("When ... the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions

as the two countries may agree...."); *Schooner Exchange v. M'Faddon*, 7 Cranch 116, 11 U.S. 116, 136, 3 L.Ed. 287 (1812) (finding a nation's jurisdiction "susceptible of no limitation, *not imposed by itself*" (emphasis added)); Letter from Secretary of State Thomas Jefferson to U.S. Minister to France Gouverneur Morris (Aug. 16, 1793), *reprinted in 1 American State Papers: Foreign Relations* 167, 169 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) ("If [a nation] cedes any portion of that jurisdiction to judges appointed by another nation, the limits of their power must depend on the instrument of cession.").

***1181** The SOFA with Japan and the Vienna Convention on Diplomatic Relations delimit the respective spheres of jurisdiction over the territory reserved for the use of American soldiers and diplomats. *See* SOFA, *supra*, arts. III, XVII; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, arts. 22, 30-31, 23 U.S.T. 3227, 500 U.N.T.S. 95. The Vienna Convention severely constrains the Philippine government's jurisdiction over U.S. embassy territory, just as the SOFA limits the Japanese government's control over the Air Force Base. In turn, these treaties grant the United States the power--and the responsibility--to regulate affairs on those territories. Indeed, the treaties leave the United States with substantially greater authority to regulate conduct than the host country. For us to decline jurisdiction in this case would upset the jurisdictional balance established by these treaties.[10]

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[10] The dissent reads *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), and *Kinsella v. United States ex*

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rel. Singleton, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), as suggesting that the Supreme Court "was aware of the jurisdictional gap issue." *See* Dissent at 1196. But neither case says anything of the sort. *Reid* and *Kinsella* held that non-Article III military tribunals could not exercise jurisdiction over non-military personnel in criminal cases. *See Reid*, 354 U.S. at 5, 77 S.Ct. 1222; *Kinsella*, 361 U.S. at 249, 80 S.Ct. 297. The Court did not consider subsection 7(3) in either of these cases, and so they can't fairly be read as expressing *any* view as to whether this subsection did or did not extend the judicial power of the United States to acts committed abroad.

The dissent quotes selectively from these cases but, when read in context, the statements have little to do with our case. *See* Dissent at 1196. Two of the quotes reason from the litigating positions of government lawyers. *See Reid*, 354 U.S. at 48, 77 S.Ct. 1222 (Frankfurter, J., concurring in result) ("A further argument is made that a decision adverse to the Government would mean that only a foreign trial could be had. Even assuming that the NATO Status of Forces Agreement ... gives jurisdiction to the United States only through its military authorities...."); *Kinsella*, 361 U.S. at 245, 80 S.Ct. 297 ("At argument, the Government indicated that there had been no effort in the Congress to make any provision for the prosecution of such cases either in continental United States or in foreign lands.").

Likewise, two of the quotes presume that, because the trial of Americans in domestic courts would be

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The United States exerts practical dominion over activities on the Yokota Air Force Base. The SOFA with Japan provides that "[w]ithin the facilities and areas, the United States may take all the measures necessary for their

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impractical, the trials must inevitably take place in foreign courts. *See Reid*, 354 U.S. at 88, 77 S.Ct. 1222 (Clark, J., dissenting) (suggesting that because trial by domestic federal courts would be "impracticable as a general solution," Congress would have to accept "that Americans committing offenses on foreign soil be tried by the courts of the country in which the offense is committed"); *Kinsella*, 361 U.S. at 259, 80 S.Ct. 297 (Harlan, J., dissenting) (finding the decision "regrettable because [it is] bound to disturb delicate arrangements with many foreign countries, and *may* result in our having to relinquish to other nations ... a substantial part of the jurisdiction now retained over American personnel under the Status of Forces Agreements" (emphasis added)).

Only one of the statements quoted by the dissent, that of Justice Whittaker, actually says that "jurisdiction of our civil courts does not extend" to "bases in foreign lands." *Kinsella*, 361 U.S. at 276, 80 S.Ct. 297 (Whittaker, J., concurring in part and dissenting in part). But it's quite a stretch to read this stray observation, in a case that did not concern the jurisdiction of Article III courts, as suggesting that the Supreme Court has stamped its imprimatur on the existence of a "jurisdictional gap."

establishment, operation, safeguarding and control." SOFA, *supra,* art. III. That broad language alone would confer upon Congress the legislative jurisdiction to prescribe and enforce the laws necessary for the management and security of the Yokota Air Force Base. But Article XVII goes farther and explicitly grants the U.S. military the authority to exercise criminal jurisdiction over all persons subject to military law. *See id.* at XVII(1). Where jurisdiction is concurrent, the SOFA grants the United States the primary right to try U.S. military and civilian personnel for offenses committed solely against U.S. security, property or persons. *See id.* at ***1182** XVII(3)(a)(i). Thus, the SOFA recognizes U.S. jurisdiction to try civilian employees of the armed forces for crimes committed on the Air Force Base--as in the case here.

Extraterritorial rights conferred by the SOFA have been confirmed by several decades of experience. Thomas Perham, a Department of Defense attorney staffed at Yokota, testified to the Air Force's almost exclusive control of affairs within the base. Transcript of Testimony of Thomas Perham, Chief of International Law at Department of Defense Headquarters in Yokota, Japan, *United States v. Corey,* No. 96-01019-DAE, at 14-15 (June 23, 1997). Japanese environmental, labor, and other regulatory statutes are not enforced on the base. American lawyers and doctors practice without local licenses, and gambling, which is strictly illegal in Japan, is permitted on the base. *See id.* at 14. In police matters, the U.S. government conducts all investigations, searches and arrests, and the Japanese police may not enter without the permission of the United States. *See id.* The Japanese government is generally reluctant to prosecute American civilians who commit crimes against American persons or property on

the base, because it recognizes that, despite its reserved claim to the territory, such matters are properly within the sphere of American interests. *See id.* at 24; *see also* Overseas Jurisdiction Advisory Committee, *Report to the Secretary of Defense, the Attorney General, the Congress of the United States* 26 (1997).

The security personnel at the doors of Lopez Court may be less imposing than the U.S. military, but the United States exercises jurisdiction over the premises nonetheless. Indeed, the United States's legal control over embassy premises and personnel is more exclusive than that over its affairs on the military base. In centuries past, "the official residences of envoys were in every respect considered to be outside the territory of the receiving state." 1 *Oppenheim's International Law* § 494, at 1076 (Robert Jennings & Arthur Watts eds., 9th ed.1992). Indeed, some courts have continued to embrace that view. *See United States v. Archer*, 51 F.Supp. 708, 709 (S.D.Cal.1943) (An American consulate "is a part of the territory of the United States of America."); *see also Erdos*, 474 F.2d at 159 (quoting *Archer* with approval). While we have rejected this view of extraterritoriality and adopted the view that the embassy lies within the territorial jurisdiction of the host country, *see McKeel*, 722 F.2d at 588, diplomatic norms continue to constrain the host state from exercising its authority without the consent of the embassy. *See 1 Oppenheim's International Law, supra*, § 494, at 1077.

These norms were codified in the Vienna Convention on Diplomatic Relations, a treaty to which both the United States and the Philippines are signatories. *See* Vienna Convention, *supra*. Article 22 guarantees that embassy

land shall remain "inviolable." *Id.* art. 22. The host country may not enter the embassy grounds without the consent of the sending state. The Convention further acknowledges that the private residences of embassy personnel, even if they are not located on the premises of the mission, enjoy the same inviolability as the embassy itself. *See id.* art. 30; *see also United States v. County of Arlington*, 702 F.2d 485 (4th Cir.1983) (finding that under the Vienna Convention an apartment building owned by East Germany is exempt from property taxes). Likewise, embassy personnel, including the support staff, enjoy absolute immunity from criminal prosecution. *See* Vienna Convention, *supra*, art. 31.

Out of necessity, diplomatic conventions have acknowledged the embassy's jurisdiction over crimes committed by its personnel. Even if the embassy territory is not considered the territory of the sending country, "an envoy must have jurisdiction over his staff in matters of discipline, he must be able to put under restraint a member of his staff who has committed a crime and is to be sent home for trial, and the like." 1 *Oppenheim's International* *1183 *Law, supra*, § 507, at 1103. The Vienna Convention *expressly* acknowledges that the sending state may exercise criminal jurisdiction over diplomatic personnel, *see* Vienna Convention, *supra*, art. 31(4), in order to encourage states to prosecute their diplomatic agents for crimes committed on embassy territory. *See Restatement, supra*, § 464 n. 9. Diplomatic conventions thus leave no doubt about our government's right to exercise jurisdiction over Corey.

Although Lopez Court remains Philippine territory in some sense, diplomatic conventions disable the Philippine

government from exerting effective control over the area. The local police could not enter the premises to investigate crimes without the consent of the ambassador. Nor could they prosecute Corey, or any other American member of the embassy staff. The United States has the real power--and the concomitant duty--to regulate conduct on those grounds.

Thus, we conclude that the United States exercises concurrent, and indeed primary, jurisdiction over the actions of United States nationals on both the Yokota Air Force Base and Lopez Court. This conclusion arises out of the plain meaning of subsection 7(3), the relevant international agreements, and the practical realities of the situation. The United States has negotiated a modus vivendi with both Japan and the Philippines for the lands under United States dominion in their respective countries. Were we to hold that federal court jurisdiction is not coextensive therewith, we would risk destabilizing the accommodation that the Executive Branch has worked out with the foreign powers. Congress intended through subsection 7(3) to avoid such dangers by extending the federal criminal laws as far as U.S. dominion.

We are not unmindful that some commentators in the military and academia have posited the existence of a jurisdictional gap over American civilians stationed at military bases abroad. *See* Overseas Jurisdiction Advisory Committee, *supra*, at 41; *Gatlin*, 216 F.3d at 221 nn. 17-20 (citing other military and academic sources that describe "jurisdictional gap"). But section 7 concerns the jurisdiction of the federal courts, and the military has no special expertise in construing such a statute. *See National Ass'n of Gov't Employees, Inc. v. Federal Labor Relations Auth.*, 179 F.3d 946, 950 (D.C.Cir.1999) (no deference to

agency's interpretation of statute it is not charged with administering); *California Nat'l Guard v. Federal Labor Relations Auth.*, 697 F.2d 874, 879 (9th Cir.1983) (same). We see no reason to create a jurisdictional vacuum where the better reading of the statute supports jurisdiction.

V

Both Lopez Court and the Yokota Air Force Base fall within the "special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 7. The district court had jurisdiction to hear the charges against Corey under 18 U.S.C. §§ 2241(a) and 2242(1).

AFFIRMED.[11]

Samuel P. King, Jr., Honolulu, Hawaii, argued the cause for Defendant-Appellant

Loretta A. Matsunaga, Assistant United States Attorney, Honolulu, Hawaii, argued the cause for Plaintiff-Appellee.

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[11] While we affirm the district court on the jurisdictional ruling, we reverse the conviction because of errors later at trial. We state the reasons for this ruling in a memorandum disposition filed concurrently with this opinion.

*1183 McKEOWN, Circuit Judge, dissenting:

The central and threshold question in this appeal is whether certain sections of the federal criminal code, specifically 18 U.S.C. §§ 2241(a) and 2242(1), apply extraterritorially so as to reach crimes committed on foreign soil. I conclude that they do not and therefore respectfully dissent. As the Supreme Court so clearly stated in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) ("*Aramco*"), "[w]e assume that Congress legislates against [a] backdrop of the presumption against extraterritoriality." In my view, this presumption against extraterritorial application of federal law, combined with the ambiguous language of *1184 the statutes and the absence of any clear Congressional intent to include foreign locations, compel the conclusion that the district court did not have jurisdiction. In short, I do not think that Congress has provided for the application of these statutes to government-leased housing in the Philippines or housing on a military base in Japan. Notably, Congress recently confirmed the existence of this "jurisdictional gap" by passing legislation to extend jurisdiction to American civilians like Corey who are employed by or accompany the military overseas. Absent such clear intent to extend the reach of U.S. laws to Corey, however, we are without jurisdiction in this case.

In reaching the opposite conclusion, the majority creates a circuit split, *see United States v. Gatlin*, 216 F.3d 207 (2d Cir.2000),[1] chooses not to apply the well-

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[1] The majority creates a circuit split with regard to

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established presumption against extraterritorial application of U.S. statutes, and misinterprets 18 U.S.C. § 7(3) by ignoring its legislative history and instead relying upon a tangential historical record. Regardless of the recent legislation, this case raises a very important issue, both for Corey individually and because the majority adopts an unprecedented view of the presumption against extraterritoriality.

I. THE NARROW ISSUE PRESENTED

The majority and I share significant common ground. I agree that neither the Constitution nor the principles of international law would prevent Congress from extending the reach of a federal criminal law to Corey, a U.S. citizen. *See Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States"); *Skiriotes v. Florida*, 313 U.S. 69, 73, 61 S.Ct. 924, 85 L.Ed. 1193 (1941) ("[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th

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application of the presumption against extraterritoriality. *Gatlin* holds that the presumption is applicable; the majority disagrees. When the Fourth Circuit interpreted § 7(3) more than 25 years ago, it did not address the issue. *See United States v. Erdos*, 474 F.2d 157 (4th Cir.1973).

Cir.1983) ("Nationality and the protective principle do allow the United States to assert jurisdiction over individuals for events occurring at United States embassies and consulates."); *see generally United States v. Vasquez- Velasco*, 15 F.3d 833, 840 & n. 5 (9th Cir.1994) (explaining various bases of jurisdiction under international law).[2]

I also agree that the relevant international agreements, namely (1) the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan (SOFA), Jan. 19, 1960, 11 U.S.T. 1652, and (2) the Vienna Convention on Diplomatic Relations and Optional

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[2] Whether the "jurisdiction" at issue here is labeled subject-matter jurisdiction (of the district court) or legislative (also referred to as prescriptive) jurisdiction (in other words, the power of Congress to legislate), *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (Scalia, J., dissenting) (discussing difference and explaining that legislative jurisdiction "refers to the authority of a state to make its laws applicable to persons or activities") (internal quotations omitted), does not affect the analysis. The question remains whether Congress in fact provided for overseas application of these federal penal statutes. *See id.* at 814, 113 S.Ct. 2891 ("[T]he question in this litigation is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.").

Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, provide the necessary authority for Congress to enact criminal legislation applicable to these locales. In short, there is no doubt that Congress can ensure that U.S. citizens who engage in heinous criminal activity overseas will stand trial in a United States court.

***1185** But this is not a case about power. The issue before us is whether Congress exercised that power, specifically whether Congress *intended* the penal statutes that criminalize Corey's conduct to apply extraterritorially. *See* Aramco, 499 U.S. at 248, 111 S.Ct. 1227 ("Whether Congress has in fact exercised that authority ... is a matter of statutory construction."); *Vasquez-Velasco*, 15 F.3d at 839. Put another way, we are not considering here whether Congress *can* bring Corey within the reach of the U.S. Criminal Code, nor are we considering whether Congress *should* do so. The only question before us is whether Congress *did* so, and it is on this point that the majority and I differ.

II. PRESUMPTION AGAINST EXTRATERRITORIALITY

A. The Law

Guiding our inquiry is the well-established cannon of statutory construction -- the presumption against extraterritoriality -- based on the understanding that Congress "is primarily concerned with domestic conditions." *Foley Bros. v. Filardo*, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949). "[T]he presumption against extraterritorial application of United States statutes requires that any lingering doubt regarding the reach of the [statute] be

resolved against [extraterritorial application]. It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Smith v. United States*, 507 U.S. 197, 203-04, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993) (internal quotations omitted) (case involving Federal Torts Claims Act). This presumption "has a foundation broader than the desire to avoid conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993). As the Supreme Court explained:

> [w]e have in this case a question of statutory construction. The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.

United States v. Bowman, 260 U.S. 94, 97-98, 43 S.Ct. 39, 67 L.Ed. 149 (1922).

In light of this longstanding principle, courts have examined the extraterritorial applicability of statutes with the view that Congress knows how to place crimes committed outside our borders within the jurisdictional reach of a statute. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 n. 7, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989) (explaining that Congress extended jurisdiction to vessels on the high seas in 18 U.S.C. § 7(1)); *see also Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.").[3]

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[3] In fact, the criminal code is replete with examples of unambiguous congressional intent to apply U.S. law overseas. *See, e.g.*, 18 U.S.C. § 112(e) (protection of foreign officials, official guests, and internationally protected persons); 18 U.S.C. § 175 (prohibitions with respect to biological weapons); 18 U.S.C. § 351(i) (congressional, cabinet, and Supreme Court assassination, kidnaping, and assault); 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 2381 (treason). The clear manifestation rule has been followed outside the criminal context as well. *See* Wade Estey, Note, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 Hastings Int'l & Comp. L.Rev. 177, 179 (1997) (providing examples); *see generally Aramco*, 499 U.S. at 258, 111 S.Ct. 1227 ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").

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***1186 B. The Presumption Applies Here**

The statutes at issue here, 18 U.S.C. §§ 2241(a) and 2242(1), prohibit certain forms of sexual misconduct committed "in the special maritime and territorial jurisdiction of the United States...." In turn, 18 U.S.C. § 7(3) defines "special maritime and territorial jurisdiction" as

> [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Neither precedent nor logic supports the majority's conclusion that the extraterritoriality presumption is inapplicable because a jurisdictional statute is at play. Under *Bowman*, the presumption clearly applies to criminal statutes. *See Bowman*, 260 U.S. at 98, 43 S.Ct. 39. And the majority's effort to avoid the presumption because § 7(3) defines territorial jurisdiction is bootstrapping at its worst. Although jurisdictional statutes address how far Congress wishes to extend U.S. law, absent clear language or some meaningful signal, such statutes do not necessarily indicate whether Congress intended extraterritorial jurisdiction. The majority's conclusion that we "should simply employ the standard tools of statutory interpretation" when interpreting § 7(3),

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[3](...continued)

see Maj. Op. at 1171 (quoting *Bin Laden*, 92 F.Supp.2d at 206 n. 32), brings us right back to the question at hand. In § 7(3), Congress defined "territorial jurisdiction." But "territorial" cannot be equated with "extraterritorial," and hence, we still need to determine whether Congress intended to extend the reach of "territorial jurisdiction" to foreign lands. To proceed otherwise would allow an end-run around the requirement that Congress must be explicit in demonstrating its intent to legislate extraterritorially.

Nevertheless, the majority relies on the jurisdictional nature of § 7(3) as a reason to avoid application of the presumption.[4] This position has been adopted by one district court in New York, *see United States v. Bin Laden*, 92 F.Supp.2d 189, 206 n. 32 (S.D.N.Y.2000), but subsequently was criticized by the Second Circuit in *Gatlin*. Although a district court opinion from another circuit would have no precedential value in this court, in some cases it might be instructive; but that is hardly the case here when the decision was already disavowed by the Second Circuit.[5]

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[4] *See* Maj. Op. at 1171 ("When Congress is considering the scope of federal jurisdiction, its attention is focused precisely on how far U.S. law should reach. Unlike ordinary domestic statutes, jurisdictional statutes inherently present the question of how far Congress wishes U.S. law to extend. There is therefore no reason to presume that Congress did, or did not, mean to act extraterritorially.").

[5] As the Second Circuit in *Gatlin* explained,

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In the present case, both parties appear to agree that the presumption against extraterritoriality applies. However, in a recent opinion involving the same jurisdictional provision at issue here, 18 U.S.C. § 7(3), Judge Sand declined to apply the presumption against extraterritoriality. *See United States v. Bin Laden*, 92 F.Supp.2d 189, 206 n. 32 (S.D.N.Y.2000). The presumption, Judge Sand reasoned, "was designed to apply to provisions that define offenses. When presented with the task of interpreting jurisdictional statutes such as Section 7(3), courts should simply employ the standard tools of statutory interpretation: analysis of text, structure, and legislative history." *Id.*

We respectfully disagree with Judge Sand. Although § 7(3) is the immediate focus of our inquiry, the ultimate question here is whether a criminal statute--*i.e.*, 18 U.S.C. § 2243(a)--applies extraterritorially. The presumption against extraterritoriality plainly applies to criminal statutes (other than the *Bowman* variety...), so § 2243(a) applies extraterritorially only if there is a clear manifestation of Congress's affirmative intent. That this inquiry requires us to look to Congress's intent in enacting 18 U.S.C. § 7, which is incorporated by reference in § 2243(a), does not, in our view, alter the applicable rule of statutory interpretation. Indeed, to accept Judge Sand's view would seriously undermine the presumption

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See also *1187*United States v. Erdos*, 474 F.2d 157, 160 (4th Cir.1973) (failing to address canon of construction and explaining that "[w]here the power of the Congress is clear, and the language of the exercise is broad, we perceive no duty to construe a statute narrowly.").

In its effort to avoid the presumption against extraterritoriality, the majority extends *Bowman* far beyond its holding or any reasonable extension of it. The majority states that "the presumption does not apply where the legislation implicates concerns that are not inherently domestic" and then cites *Bowman* as an example, explaining that in that case "the Supreme Court held that the territorial presumption does not govern the interpretation of criminal statutes that, by their nature, implicate the legitimate interests of the United States abroad." Maj. Op. at 1170-71.

Bowman does not stand for such a far-reaching proposition. Rather, *Bowman* recognizes a narrow exception to the presumption against extraterritoriality for "criminal statutes which are, as a class, not logically dependant on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own

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[5](...continued)
against extraterritoriality since Congress often enacts jurisdictional provisions that are then incorporated by reference elsewhere.
Gatlin, 216 F.3d at 212 n. 6.

citizens, officers, or agents." 260 U.S. at 98, 43 S.Ct. 39.[6] There can be little doubt that the narrow *Bowman* exception does not cover the penal statutes at issue here. Nor, in my view, does the narrow exception emanating from *Bowman* and its progeny-the commonsense principle that courts should not presume Congress intended to legislate domestically when it criminalizes behavior that presents a cognizable threat within our borders[7]--support the majority's conclusion. *See Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 71 (2d Cir.1994) ("The Supreme Court's recent discussions of the presumption against extraterritoriality, none of which mentions *Bowman*, seem

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[6] This exception, however, applies to statutes involving crimes against the government, *see, e.g., United States v. Cotten*, 471 F.2d 744 (9th Cir.1973), and crimes relating to drug smuggling, *see United States v. Larsen*, 952 F.2d 1099 (9th Cir.1991) (marijuana smuggling).

[7] *See Skiriotes*, 313 U.S. at 73-74, 61 S.Ct. 924 ("[A] criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to the citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.") (citing *Bowman*); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir.1977) ("[I]f the nature of the law does not mandate its extraterritorial application, then a presumption arises against such application.") (citing *Bowman*).

to require that *all* statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears.").

The majority offers a second reason for not applying the presumption here, namely that "[l]and subject to subsection 7(3) is not 'extraterritorial,' as the Supreme Court has defined the term." Maj. Op. at 1171. In support of this statement, the majority cites to a single statement in *Aramco*. *See Aramco*, 499 U.S. at 248, 111 S.Ct. 1227 ("In applying this rule of construction, we look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or *has some measure of legislative control*.' ") (quoting *Foley Bros.*, 336 U.S. at 285, 69 S.Ct. 575) (emphasis added).[8]

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[8] The majority's citation to *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528, 533 (D.C.Cir.1993), does little to advance its argument. In *Massey*, the court addressed extraterritorial application of the National Environmental Policy Act. The court held, however, that "the presumption against the extraterritorial application of statutes described in Aramco does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica-- a continent without a sovereign, and an area over which the United States has a great measure of legislative control." *Id.* at 529. Unlike the conduct in *Massey*, the conduct here occurred entirely outside our borders. Moreover, the Philippines and Japan are

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*1188 Read literally, as the majority proposes, this language would eviscerate the concept of extraterritoriality. If "territorial" automatically includes foreign lands where U.S. law applies, then the presumption against extraterritoriality is pointless because there would be no "extraterritorial" application of U.S. law.

The Second Circuit declined to go down a similar path in Kollias. The court rejected the argument that the presumption against extraterritoriality does not apply to a case involving application of the Longshore and Harbor Workers' Compensation Act (the "LHWCA") to an injury on an American flag vessel because the ship "was in effect a United States territory as it traveled across the high seas." 29 F.3d at 72. After first recognizing that the law of the flag does not necessarily govern shipboard conduct, the court exposed the underlying circularity of this reasoning:

> In any case, the concept of extraterritoriality does not refer to the body of law that governs the dispute; if it did, extraterritorial application of United States statutes would be an impossibility because any place where United States law governed a particular dispute would be considered United States territory. Accordingly, we decline to

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[8](...continued)
governed by other sovereigns, unlike Antarctica, which "is generally considered to be a 'global common' and frequently analogized to outer space." *Id.* (citation omitted)

> characterize the [ship] as a kind of floating United States territory, where application of the LHWCA would not be extraterritorial.

Id.[9]

Simply declaring the foreign locations to be part of U.S. territory is a semantic sleight of hand that avoids the real question of statutory interpretation and congressional intent. I turn next to an examination of the statute itself.

III. THE STATUTE

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[9] Although in my view the presumption against extraterritoriality applies with full force here and plainly directs the analysis, I agree with the Second Circuit's conclusion that the same result would be reached even if the presumption did not apply. *See Gatlin*, 216 F.3d at 212 n. 6; *see also Erdos*, 474 F.2d at 159-60 (acknowledging that, "indeed, it is possible that when the statute was enacted the attention of the Congress was not in the slightest focused on extraterritorial jurisdiction."). I certainly cannot join in the majority's apparent attempt to turn the presumption on its head.

It also bears noting that we are dealing with a punitive statute, and as such the rule of lenity resonates, even if not directly applicable. *See generally Staples v. United States*, 511 U.S. 600, 619 n. 17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994) (explaining that the rule of lenity, "under which an ambiguous criminal statute is to be construed in favor of the accused," applies "where, after seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute") (internal quotations omitted).

A. The Statute is Ambiguous

With the presumption against extraterritoriality application as the viewing lens, the first task is to analyze the statutory text to determine whether Congress intended § 7(3) to cover the foreign locations at issue here.[10] As

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[10] The presumption against extraterritoriality is not insurmountable. For example, in *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 390, 69 S.Ct. 140, 93 L.Ed. 76 (1948), the Supreme Court held that the Fair Labor Standards Act, which by its terms applies to "any State of the United States or the District of Columbia or any Territory or possession of the United States," included land leased by the United States in Bermuda for use as a military base, reasoning that "possessions" includes leased bases overseas. *But see United States v. Spelar*, 338 U.S. 217, 224, 70 S.Ct. 10, 94 L.Ed. 3 (1949) (Frankfurter, J., concurring) (criticizing *Vermilya-Brown*); *id.* at 225, 70 S.Ct. 10 (Jackson, J., concurring) (suggesting that Court should "retreat from" *Vermilya-Brown*). The Court, however, did not address the presumption against extraterritoriality. Nor does the statute here include any specific language, such as "possession," to guide our inquiry.

Similarly, in the area of antitrust law, the Supreme Court has held that Congress has overcome the presumption against extraterritoriality. Adopting reasoning similar to that in *Bowman*, the Supreme Court found that the Sherman Act "reach[es] conduct outside our borders, but only when the conduct has an effect on American commerce." *Matsushita Elec. Indus. Co., Ltd. v.*

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noted before, the special *1189 maritime and territorial jurisdiction includes:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3).

On its face, the language of § 7(3) is ambiguous and certainly does not demonstrate an intent to apply to locations outside the borders of the United States. Although "any lands" could arguably be stretched to include foreign lands, a "plausible" reading of a statute does not overcome the presumption against extraterritoriality. *See Aramco*, 499 U.S. at 253, 111 S.Ct. 1227 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the

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[10](...continued)
Zenith Radio Corp., 475 U.S. 574, 582 n. 6, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *accord Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) ("[I]t is well established by now that the Sherman Act applies to conduct that was meant to produce and did in fact produce some substantial effect in the United States.").

presumption."). Indeed, the fact that the statute has spawned such a multiplicity of interpretations, ranging from *Gatlin* to *Erdos* to the majority, underscores not only the ambiguity of the statute but also the need for the presumption itself.

Nor does the structure of § 7(3) support an intention to include foreign lands acquired overseas. In my view, both the first and second clauses of § 7(3) refer to lands *within* our borders, as the federal government may acquire lands other than "by consent of the legislature" of a state. *See James v. Dravo Contracting Co.*, 302 U.S. 134, 142, 147, 58 S.Ct. 208, 82 L.Ed. 155 (1937). Indeed, the United States acquired many lands within our present borders without the "consent" of the legislature of *any* state. *See Gatlin*, 216 F.3d at 215-16 & n 10 (quoting Jordan J. Paust, *Non-Extraterritoriality of 'Special Territorial Jurisdiction" of the United States: Forgotten History and the Errors of Erdos*, 24 Yale J. Int'l L. 305, 318-20 (1999), noting that the United States acquired Arlington National Cemetery in Virginia, places within the District of Columbia, and lands acquired in territorial form before states existed in those areas *without* the consent of the legislature of any state).

The argument that the statute must apply extraterritorially also ignores a key term within the first clause: "reserved." The first clause refers to "lands reserved or acquired." "Reserved" has a special historical meaning that has nothing to do with foreign countries. *See* Paust, 24 Yale J. Int'l L. at 325 ("[I]f the land is not owned by the United States, the land as such is not 'reserved' or 'acquired' by the United States within the ordinary meaning of those terms or the meaning clarified by legislative history and historical context, especially the special meaning of 'reserved lands.'"); *see also* Black's Law

Dictionary 1307-08 (6th ed. 1990) (defining "reserved land" as "[p]ublic land that has been withheld or kept back from sale or disposition" and "reservation" as "a tract of land ... which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc.").

This proposition is illustrated by the legislative history of the precursors to § 7(3) and the Assimilated Crimes Act, 18 U.S.C. § 13, which adopts the criminal law of the states, territories, possessions, or districts as the criminal laws for "places now existing *1190 or hereafter *reserved or acquired as provided in* section 7 *of this title* ...." 18 U.S.C. § 13(a) (emphasis added). In 1909, Congress added "reserved" to the 1874 version of that statute[11] after courts held that the statute did not apply to any territory that had been obtained by the United States in any manner other than by cession:

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[11] The 1874 version of the statute appeared as Section 5391 of the Revised Statutes of the United States. That section provided, in relevant part:

> If any offense be committed in any place which has been or may hereafter be, *ceded to and under the jurisdiction of the United States,* which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated....

70 Rev. Stat. § 5391 (1874) (emphasis added).

> [I]t was held that ... under section 5391, this law did not apply to any territory that had been obtained since [the statute was enacted in] 1825 except by cession, and it was discovered that a great deal of property, for military reservations, for arsenals, post-offices, custom-houses, quarantine stations, and court-houses had been acquired by reservation; that the United States, owning the land existing in territorial form, would reserve a portion of it for Federal purposes, and then admit the State to the Union. The Supreme Court said, "Your act does not cover that class of cases. It is specific. It relates to territory subsequently acquired by cession. It relates to the laws of the United States that were in force at the time you passed it, to lands ceded to the United Sates by the legislature of a State in accordance with the provisions of the Constitution, but it does not relate to territory that has been subsequently acquired in any other way."

42 Cong. Rec. 584 (1908); *accord id.* at 593; Paust, 24 Yale J. Int'l L. at 316-17.[12] In other words, in 1909, Congress

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[12] The amended Section 5391 provided: "Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the *places now existing or hereafter reserved or acquired,* described in [Section 272] of this Act," shall commit an act which is not criminalized by the United States shall be prosecuted under state law. *See* Act of March 4, 1909. ch. 321, § 289, 35 Stat. 1145 (emphasis added). As discussed *infra,* §

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was concerned about the need for legislation governing land that the United States owned and retained when a new state was created. *See* Paust, 24 Yale J. Int'l L. at 317. The pointed reference to "reserved" in the first clause of § 7(3), which Congress similarly included in its 1909 precursor, suggests that *both* clauses of § 7(3) apply only domestically.

Even if, as the majority concludes, § 7(3) applies "outside the borders of the fifty states," Maj. Op. at 1172, that conclusion does not perforce mean that Congress intended it to cover lands that remain part of foreign countries. As the majority itself points out, *see* Maj. Op. at 1173-74, new lands became a part of the United States through, among other means annexation, conquest, and purchase.

Finally, the highly piecemeal fashion in which § 7 was compiled undermines the majority's attempt to read the statute holistically. *See* Maj. Op. at 1171- 72. "[I]t makes little sense to inquire into congressional intent by looking at the statute as a whole since most subsections of § 7 were enacted separately by Congress and have their own legislative histories." *Gatlin*, 216 F.3d at 216 n. 11. Contrary to the majority's interpretation, the other subsections of § 7 demonstrate that Congress *explicitly provides* for jurisdiction *when it intends to do so. See, e.g.*, 18 U.S.C. § 7(1) (high seas); 18 U.S.C. § 7(6) (outer space). Congressional intent with respect to the *other* subsections

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[12](...continued)
272(3) was the 1909 precursor to § 7(3) in which Congress similarly referred to lands "reserved or acquired."

of § 7, however, does *not* reflect congressional intent to extend § 7(3) across foreign borders. Indeed, in light of the fact that Congress clearly legislated extraterritorially in the *1191 other subsections of § 7 but did not do so in § 7(3), the presumption against extraterritoriality applies with full force.

In conclusion, although the structure of § 7(3) reinforces the conclusion that the United States may acquire lands in more than one fashion, it is a dead end in terms of analyzing whether Congress meant to include lands outside the United States and within the borders of other nations. To suggest, as the majority does, that "Congress unmistakably had foreign locales in mind when it set about defining that jurisdiction," and that the statute "extends the jurisdiction ... to areas where American citizens and property need protection, yet no other government effectively safeguards those interests," Maj. Op. at 1171, is to manufacture congressional intent by substituting a judicial policy judgment for a congressional one. The most one can conclude is that the language manifests no clear congressional intent. This statute is a poster-child for ambiguity--every court attempting to construe and harmonize the statute goes through contortions trying to explain what Congress meant but did not say. In this instance, we should look to other "available evidence," namely, the legislative history. *Sale*, 509 U.S. at 177, 113 S.Ct. 2549.

B. Legislative History

The legislative history of § 7(3) and its precursors, *see* Act of 1790, ch. 9, 1 Stat. 112 (1790); 70 Rev. Stat., ch. 3, § 5539 (1874); Act of March 4, 1909, ch. 321, 35 Stat. 1088 (1909), reinforces the presumption against extraterri-

toriality. Nothing in that history suggests that Congress intended the statute to apply to foreign localities, such as embassy housing and military bases, within foreign countries; indeed, the legislative history counsels that Congress intended to address domestic, not foreign, jurisdiction.

Addressing the identical question presented here, in the context of a military base in Germany, the Second Circuit in *Gatlin* exhaustively traced the history of § 7(3) and concluded that "the legislative history of § 7(3) and its precursors demonstrates unequivocally that Congress, in fact, intended the statute to apply exclusively to the territorial United States." 216 F.3d at 220; *id.* at 219 ("Nowhere in the legislative history of the 1909 Act--either in the floor debates or in the lengthy report of the Special Joint Committee on the Revision of the Laws--is there any indication that the statute was meant to extend federal criminal jurisdiction to land in a foreign nation.") (citations omitted); *see also Bin Laden*, 92 F.Supp.2d at 209-10; Paust, 24 Yale J. Int'l L. at 314-24.

Gatlin lays out the legislative history in detail and there is no need to reproduce a similar analysis here. The key to the legislative history and to interpretation of this statute lies in examination of the statute at three points in time: upon enactment in 1790, at the time of recodification in 1909, and when the statute was amended in 1940.

The statute can be traced to legislation passed by the First Congress, "An Act for the Punishment of certain Crimes Against the United States." Act of April 30, 1790, ch. 9, 1 Stat. 112 (1790). Unlike the current substantive criminal law, which references a separate statutory section that defines jurisdiction, the 1790 Act incorporated jurisdiction into the substantive definition of the offense,

limiting it to certain lands "under the sole and exclusive jurisdiction of the United States." *Id.* at §§ 3, 6-7. As noted in *Gatlin*, "the fact that the 1790 Act delimited the jurisdiction of the federal courts to lands over which the United States exercised exclusive legislative jurisdiction 'virtually guarantees' that the provision was not intended to apply to offenses committed in a foreign territory." *Gatlin*, 216 F.3d at 216 (quoting *Bin Laden*, 92 F.Supp.2d at 209).

The 1790 Act remained essentially unchanged until 1909, when Congress undertook a comprehensive codification of the criminal code. For the first time, the section defining jurisdiction was codified in a separate statute, but again, this precursor *1192 to § 7(3) applied only to lands over which the United States had "exclusive" jurisdiction. *See* Act of March 4, 1909, ch. 321 § 272, 35 Stat. 1143 (1909) ("When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building."). Congress could not have intended this provision to apply to property in foreign countries. Congress knew how to extend criminal jurisdiction when it wanted to,[13] and its failure to do so in 1909 is telling.

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[13] For example, Congress did not presume that "Indian country" fell within the sole and exclusive jurisdiction of the United States, but rather explicitly provided that

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It was not until 1940 that Congress expanded the statutory scope to include land over which the federal government had "concurrent" jurisdiction. *See* Act of June 11, 1940, ch. 323, 54 Stat. 304 (1940) ("When committed within or on any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.").

The legislative history of the 1940 amendment indicates that Congress did not intend to expand the scope of federal criminal jurisdiction by adding "concurrent," and surely not to foreign lands. Rather, according to the

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[13](...continued)
"the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States ... shall extend to the Indian country." *Ex parte Crow Dog*, 109 U.S. 556, 558, 3 S.Ct. 396, 27 L.Ed. 1030 (1883) (quoting 28 Rev. Stat. ch. 4, § 2145). Further, the Supreme Court recognized the need for Congress to be explicit when providing for federal jurisdiction over Indian reservations falling outside the Western territories: "If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized Territorial government [including by treaty], it would require an act of Congress to attach it to a judicial district...." *Id.* at 559, 3 S.Ct. 396.

legislative history, Congress intended to respond to a 1937 Supreme Court decision that held that states consensually transferring lands to the United States may retain partial or concurrent jurisdiction:

> Prior to the decision of the Supreme Court in *James v. Dravo Contracting Company* (302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155) (December 1937), it was the accepted view that the United States acquired exclusive jurisdiction over any lands purchased with the consent of the State for any of the purposes enumerated in article I, section 8, clause 17, of the Constitution, and that any provision of a State statute retaining partial or concurrent jurisdiction was inoperable. In the *Dravo* case it was held that a State may properly retain partial or concurrent jurisdiction.
>
> The provisions of the Criminal Code ... limited the criminal jurisdiction of the Federal Government to such Federal reservations in respect to which the United States had acquired exclusive jurisdiction.
>
> This bill simply restores to the Federal Government the jurisdiction it was recognized as having until the Dravo decision was handed down.
>
> The most significant effect of this bill is to grant Federal courts concurrent criminal jurisdiction on reservations where the United States does not have exclusive jurisdiction.

H.R.Rep. No. 76-1623, at 1 (1940); *see also Gatlin*, 216 F.3d at 219-20 n. 14 ("Notwithstanding this change, it is apparent from what little legislative history there is of the 1940 Act ... that, in making this change, the 76th Congress did not intend to extend the reach of the statute to lands outside the United States."); *Bin Laden*, 92 F.Supp.2d at

210-11 & n. 37. In other words, Congress intended the addition *1193 of "concurrent" to address the issue of a *state's* concurrent jurisdiction.

The addition of "concurrent" in 1940, without any contemporary indication that the change was brought about by a desire to include locations in foreign countries, undermines the majority's reliance on the statute's reference to "concurrent" jurisdiction. I cannot agree with the majority's unsupported assertion that there is no reason "to presume that when, in 1940, Congress extended criminal jurisdiction to those lands under the concurrent authority of the United States, it intended to limit the reach of subsection 7(3) to areas under the concurrent authority of the states, but not those under the concurrent authority of other sovereigns." Maj. Op. at 1175. Although the presumption against extraterritoriality applies to this statute, we do not need to presume anything here--an examination of the statute and its history indicates that § 7(3) does not extend to lands abroad. The majority's quantum leap from the statute's long-standing reference to "exclusive" jurisdiction to assertion of jurisdiction over crimes in foreign countries cannot be sustained.

The legislative history points to one conclusion: § 7(3) applies only in the domestic context, not to federal criminal jurisdiction beyond our borders.

IV. RESORT TO HISTORY

The majority's effort to find support through reference to the history of our nation's westward expansion and overseas acquisitions in no way informs the question here. Rather the history demonstrates simply that Congress

knew how to extend explicitly the reach of the federal criminal code when it so desired. I am not persuaded by the majority's attempts to locate in the general history of our country's nineteenth century expansion evidence of an intent that a provision, which at the time covered only lands over which the United States had "exclusive" jurisdiction, would apply to places undoubtedly located in foreign countries.

The majority begins with the statement that, at the turn of the century (when the precursor to § 7(3) spoke only of lands over which the U.S. had "exclusive" jurisdiction), Americans "may have believed that, so long as territory remained unequivocally foreign, it lay outside the jurisdiction of the United States, [but] they were well aware that territory could change hands, and the United States could gain exclusive jurisdiction over territory that other countries claimed as their own." Maj. Op. at 1173. Indeed, as the majority points out, the turn of the century marked a period of great expansion in our nation's history, which suggests that "[t]his was clearly not a time when Americans thought of their borders as static or of foreign territory as sacrosanct." *Id.* at 1173. True enough, but, at risk of being perceived as glib, I ask, so what? Neither was this a time when Americans viewed themselves as having exclusive jurisdiction over land clearly within the territorial boundaries of a foreign sovereign.

This historical digression does not advance our inquiry, for we are dealing here with embassy housing and a military base, not lands that became part of our country through annexation, purchase or conquest, and as such fell within our exclusive jurisdiction. Nor are we dealing with land over which United States sovereignty or

jurisdiction is disputed. *See* Maj. Op. at 1175 ("Courts had no hesitation about treating these territories as within our exclusive jurisdiction, even though foreign governments claimed the territory as their own.").[14] The natural

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[14] The majority's discussion of *Watts v. United States*, 1 Wash. Terr. 288 (Wash.Terr.1870), is incomplete. *See* Maj. Op. at 1174-75. The statute at issue in that case was the precursor to § 7(3) created by the 1790 Act. *See* 1790 Act, ch. 9, § 3, 1 Stat. 113. The court in *Watts* first concluded that, despite a conflict between the U.S. and Great Britain, because the U.S. "claims San Juan Island, we must treat it as under the general laws of the United States...." *Watts*, 1 Wash. Terr. at 296. The court, however, went on to find that, "in order that the crime of which the defendant is charged should be within the jurisdiction of the Court below, *it was not only necessary that it be committed within the United States, but in a place within the 'sole and exclusive jurisdiction of the United States.' This phrase 'sole and exclusive' means exclusive of any other domestic jurisdiction, and has no reference to foreign authority.*" *Id.* (emphasis added). The court then held that the U.S. did not have sole and exclusive jurisdiction. *Id.* at 299.

Watts suggests that determining whether criminal jurisdiction exists involves a two-part inquiry, namely: (1) whether the land was within the U.S. and, if so, (2) whether the U.S. had sole and exclusive jurisdiction over that land. *See also id.* at 301 (Jacobs, C.J., dissenting) ("We all agree that the phrase 'sole and exclusive jurisdiction' as used in the [act] has no reference to a claim of jurisdiction made by any foreign power, but to state and

(continued...)

application of § 7(3)'s precursors to such lands does not *1194 suggest, let alone conclusively determine, that Congress expected property used by the United States but located squarely and unequivocally within foreign borders[15] to fall within our "exclusive" jurisdiction.[16]

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[14](...continued)
federal jurisdiction, or as we are situated, to federal as contradistinguished from Territorial jurisdiction."). The implication of this reasoning is that the "exclusive or concurrent" language of § 7(3) as it reads today similarly pertains to the federal government vis a vis the states.

The majority's reliance on *Jones v. United States*, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691 (1890), is also misplaced. *See* Maj. Op. at 1174- 75. That case involved an island containing guano deposits over which the U.S. had exclusive jurisdiction, *see id.* at 217, 11 S.Ct. 80, and to which Congress expressly extended federal criminal laws, *see id.* at 211- 12, 11 S.Ct. 80. There was no question in that case that Congress intended to bring the island at issue within the scope of federal criminal jurisdiction, although there was a question regarding Haiti's challenge to U.S. sovereignty over the island. *See id.* at 219-24, 11 S.Ct. 80.

[15] *See United States v. Spelar*, 338 U.S. 217, 219, 70 S.Ct. 10, 94 L.Ed. 3 (1949) (holding that "claims arising in a foreign country" exclusion in Federal Tort Claims Act applies to a leased U.S. airbase in Newfoundland because the base remained subject to the sovereignty of Great
(continued...)

The discussion of legislation extending federal criminal jurisdiction to territory under Indian control and islands claimed by Americans for their guano deposits

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[15](...continued)
Britain and therefore lay within a "foreign country").

[16] The majority's recognition that the "original 1790 Act provided basic criminal laws for lands outside the jurisdiction of any other sovereign," Maj. Op. at 1173, carries little weight here, for neither of these locations is "outside the jurisdiction of any other sovereign." Although embassy officials may be immune from prosecution in the host state, that does not imply that the host state does not have jurisdiction over the embassy. *See* Restatement (Third) of the Foreign Relations Law of the United States § 466 cmt. a (1986) ("That [embassy] premises are inviolable does not mean that they are extraterritorial. Acts committed on those premises are within the territorial jurisdiction of the receiving state...."). Similarly, under the U.S.--Japan SOFA, the two countries have concurrent jurisdiction over criminal acts committed on military bases in Japan (presuming the acts are in fact criminal under the laws of both countries). *See* SOFA, art. XVII. In light of this situation, the government's alternative argument--that jurisdiction lies under § 7(7), which provides that the special maritime and territorial jurisdiction also includes "Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States," is misplaced.

also fails to provide support for the majority's decision. *See* Maj. Op. at 1174-75.[17] Rather, these acts further demonstrate that when it so desires, Congress knows how to make explicit its intent to include lands within the reach of the federal criminal code. In fact, the majority underscores this conclusion by observing that "[w]hen the United States claimed territory far beyond its borders, Congress promptly extended federal jurisdiction to those areas under U.S. control." Maj. Op. at 1175. Nor is the majority's recognition that Congress "understood criminal jurisdiction to extend to all lands claimed by the United States, without regard to whether they were within a particular state or even within the continental United States," Maj. Op. at 1175, helpful, because the locations at issue here are not "lands claimed by the United States."

*1195 The history of our westward expansion, while interesting, is far afield from congressional intent in 1790 or remedial legislation adopted in 1940. To the extent we look beyond the statute, I find the legislative history far more instructive and compelling.

V. LEASED HOUSING AND MILITARY BASES

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[17] The guano islands are more akin to newly discovered, previously unclaimed territory over which the United States may assert exclusive jurisdiction, *see Jones v. United States*, 137 U.S. at 212, 11 S.Ct. 80, than to U.S. embassy housing and military bases located within the borders of a foreign nation.

Because I conclude that § 7(3) does not extend the reach of 18 U.S.C. §§ 2241(a) and 2242(1) extraterritorially, it is unnecessary to consider whether the United States exercises "exclusive or concurrent" jurisdiction over the leased housing or military base in this case. Nonetheless, some discussion of the nature of these locations is useful, as it illustrates the far-reaching consequences of the majority opinion and the tremendous conflict it creates with the long-held understanding of the Supreme Court, Congress, the military, and the commentators.

A. Leased Housing

Bearing in mind that § 7(3) was intended at the outset to extend only to lands under the exclusive control of the United States, an apartment leased by the United States in a foreign country is both legally and conceptually far afield from that category. The United States is not an infrequent tenant abroad. Under the majority's approach, criminal jurisdiction would extend to more than 10,000 properties leased by the United States in foreign countries, ranging from Australia to the Vatican City, and not including extensive property leased by defense agencies. *See* United States Gen. Servs. Admin., Summary Report on Real Property Leased by the United States Throughout the World as of September 30, 1999, at 13 (1999). Absent congressional directive, we should not treat lightly such a far flung extension of criminal jurisdiction.

B. Military Bases and the Jurisdictional Gap

Jurisdiction over civilians accompanying the military abroad presents a special case. The United States typically negotiates this jurisdiction with other countries via Status of Forces Agreements ("SOFAs"). *See* Steven J. Lepper, *A*

Primer on Foreign Criminal Jurisdiction, 37 A.F. L.Rev. 169, 171 (1994) ("Today, it is widely agreed that in the absence of a treaty like SOFA, jurisdiction over foreign forces rests exclusively with the host state.").[18] The 1960 U.S.--Japan SOFA follows the standard format,[19] giving Japan the

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[18] *See generally 1 Oppenheim's International Law* § 558, at 1157 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("The view, formerly widely held, that the force was in all respects to be regarded as beyond the jurisdiction of the territorial state ... and subject only to that of its own authorities can no longer be maintained. The fiction of extra- territoriality has in this area, as in others, been discarded.") (footnote omitted).

[19] Article XVII provides:

> 1. Subject to the provisions of this Article,
>
> (a) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;
>
> (b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependants with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

A complete reading of the SOFA suggests that the

(continued...)

exclusive power to prosecute American civilians like Corey when their offenses are not punishable under the laws of the United States.[20]

*1196 Until the Supreme Court's ruling in *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957), it was generally presumed that United States military courts had jurisdiction over civilians accompanying the military who committed crimes abroad. *See Gatlin*, 216 F.3d at 220 n. 15; Lepper, 37 A.F. L.Rev. at 171. In *Reid*, however, the Supreme Court held to the contrary, concluding that the exercise of jurisdiction over a civilian dependent in a

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[19](...continued)
land remained Japanese territory. *See, e.g.*, Art. XXIII ("The Government of Japan agrees to seek such legislation and to take such other action as may be necessary to ensure the adequate security and protection *within its territory* of installations, equipment, property, records and official information of the United States, and for the punishment of offenders under the applicable laws of Japan.") (emphasis added).

[20] Article XVII § 2(b) provides for Japan's jurisdiction over dependents of the U.S. military in Japan for offenses punishable under the law of Japan by not under the law of the U.S.; "The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependants with respect to offenses ... punishable by its law but not by the law of the United States."

capital case during peacetime was unconstitutional. *See Reid*, 354 U.S. at 40-41, 77 S.Ct. 1222. In so holding, the Court created a "jurisdictional gap" with respect to civilians accompanying the military abroad. *See* Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas-Still With Us*, 117 Mil. L. Rev. 153, 173-74 (1987).

Although the Court was not addressing § 7(3), *Reid* suggests that the Court was aware of the jurisdictional gap issue. For example, Justice Frankfurter noted that the government argued that an adverse decision meant that "only a foreign trial could be had." 354 U.S. at 48, 77 S.Ct. 1222 (Frankfurter, J., concurring). Similarly, Justice Clark recognized that "[t]he only alternative remaining--probably the alternative that the Congress will now be forced to choose--is that Americans committing offenses on foreign soil be tried by the courts of the country in which the offense is committed." *Id.* at 88, 77 S.Ct. 1222 (Clark, J., dissenting).

Three years after *Reid*, in *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 80 S.Ct. 297, 4 L.Ed.2d 268 (1960), the dilemma of the jurisdictional gap again surfaced. With respect to civilians accompanying the military outside the United States, the Court pointed to "the want of legislation providing for trials in capital cases in Article III courts sitting in the United States," noting that, "[a]t argument, the Government indicated that there had been no effort in the Congress to make any provision for the prosecution of such cases either in continental United States or in foreign lands." *Id.* at 245, 80 S.Ct. 297. Justice Whittaker agreed that "jurisdiction of our civil courts does not extend" to "bases in foreign lands." *Id.* at 276, 80 S.Ct.

297 (Whittaker, J., concurring in part and dissenting in part). Finally, Justice Harlan, in dissent, wrote that the Court's decisions "are ... regrettable because they are bound to disturb delicate arrangements with many foreign countries, and may result in our having to relinquish to other nations ... a substantial part of the jurisdiction now retained over American personnel under the Status of Forces Agreements." *Id.* at 259, 80 S.Ct. 297 (Harlan, J., dissenting).

The majority gives short shrift to the conclusion that such a jurisdictional gap exists. *See* Maj. Op. at 1172 n. 3. But Congress recently passed legislation specifically to close the gap. *See* Military Extraterritorial Jurisdiction Act of 2000, S. 768, 106th Cong. (2000).[21] I view the recent legislation as confirmatory "icing on the cake" and not, as the majority suggests, evidence of congressional intent in 1790. The gap is not illusory. Prior to this new legislation, Congress made numerous efforts to enact legislation to fill the gap. *See Gatlin*, 216 F.3d at 222 n. 23 (documenting multiple failed congressional attempts to close gap); Susan S. Gibson, *Lack of Extraterritorial Jurisdiction Over Civilians: A New Look at an Old Problem*, 148 Mil. L.Rev. 114, 136-37 (1995); Thomas G. Becker, *Justice on the Far Side of the World: The Continuing Problem of Misconduct by Civilians Accompanying the Armed Forces in Foreign Countries*, 18 Hastings Int'l & Comp. L. Rev. 277, 287 (1995) (discussing recent proposals to make conduct that would be punishable if committed within the special maritime and territorial jurisdiction also punishable if committed by civilians accompanying the armed forces overseas);

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[21] The legislation awaits the President's signature.

Robinson O. Everett and Laurent R. Hourcle, *Crime Without Punishment-Ex-Servicemen, Civilian Employees and Dependants*, 13 U.S.A.F.J.A.G. L. Rev. 184 (1971) (discussing § 7(3) at length); McClelland, *supra* at 199-200 (discussing *1197 proposals to expand § 7(3) during the 1980s that would have covered crimes committed "within a United States military installation abroad"). Although this new legislation does not apply to Corey, it certainly confirms the existence of the gap in this case--and, by implication, the conclusion that § 7(3) does *not* fill the gap. Moreover, the military has also recognized the existence of this jurisdictional gap. *See* Department of Defense Overseas Jurisdiction Advisory Committee, Report of the Advisory Committee on Criminal Law Jurisdiction Over Civilians Accompanying the Armed Forces in Time of Armed Conflict 41 (1997) ("Installations in foreign countries are not currently within the special maritime and territorial jurisdiction of the United States.").[22]

My conclusion that a jurisdictional gap exists--and that § 7(3) does not fill it--is consistent with the consensus among the Supreme Court, Congress, the military, and commentators. I agree with the Second Circuit that "the existence of this jurisdictional gap is an issue that ... warrants serious congressional consideration." *Gatlin*, 216

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[22] The majority dismisses the views of the military as well as those of academics regarding the "jurisdictional gap." *See* Maj. Op. at 40. Although I am well aware that these views are not entitled to special deference, I also recognize that the military has a particular interest in this issue, and its conclusion that a gap exists is noteworthy.

F.3d at 209. But because Congress chose not to address this problem in § 7(3), we are without jurisdiction over Corey.

VI. CONCLUSION

Regardless of whether we see this as a problem that requires fixing, it is a problem that the federal courts are without power to fix. Simply put, the onus is not on the courts to provide for jurisdiction in this case. Congress has the power under both the Constitution and international law to extend the reach of our criminal laws beyond the borders of the United States. The question is not whether jurisdiction should extend extraterritorially, but whether, under this statute, Congress in fact extended the jurisdiction. The answer here is no. Therefore, I respectfully dissent.

UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee,
v.
Clifton S. COREY, Defendant-Appellant.

No. 99-10232
D.C. No. CR-96-01019-MLR

ORDER

Before: KOZINSKI, KLEINFELD and McKEOWN, Circuit Judges.

The petition for rehearing is denied; Judge McKeown would grant the petition.

The full court was advised of the petition for rehearing *en banc*. A judge of the court requested a vote on whether to rehear the matter *en banc*, but a majority of the nonrecused active judges failed to vote in favor of *en banc* consideration. Fed. R. App. 35. The petition for rehearing *en banc* is denied.

(Filed April 9, 2001)

UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee,
v.
Clifton S. COREY, Defendant-Appellant.

No. 99-10232
D.C. No. CR-96-01019-MLR

Appeal from the United States District Court for the District of Hawaii (Honolulu)

JUDGMENT

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this case be, and hereby is AFFIRMED.

Filed and entered November 20, 2000.

(A TRUE COPY, CATHY A. CATTERSON, Clerk of Court, ATTEST April 17, 2001)
(Filed in the United States District Court, District of Hawaii, April 26, 2001)

THE TWO DISTRICT COURT OPINIONS

The decision of the District Court on the Government's Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law During Trial is reprinted below at App. 81. This decision was rendered before the first trial in this case which ended in a hung jury. At this time (prior to the first trial), Defendant conceded that the premises of an American Embassy overseas were within the "special . . . territorial jurisdiction of the United States" (18 USC §7(3)) based on *Erdos* as the District Court notes in its opinion below at App. 88. For the first trial, Petitioner was charged only with crimes which allegedly occurred in Manila.

After the first trial ended in a hung jury, Defendant successfully sought payment under the CJA for services of an expert in international law, Professor Jordan J. Paust. Professor Paust's research revealed that the premises of an American Embassy overseas were *not* within the "special . . . territorial jurisdiction of the United States," so Defendant withdrew his concession to the contrary which he had made earlier (prior to the first trial, as noted above) and moved for a dismissal of the indictment between the first and second trials. The District Court's decision, rendered by the District Court between the first and second trials, denying Defendant's motion to dismiss the indictment for lack of territorial jurisdiction is reprinted below at App. 94. For the second trial, Petitioner was charged with crimes which allegedly occurred in Manila and in Japan.

(This is an unreported decision.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	) Cr. No. 96-1019DAE
	)
Plaintiff,	)
	)
vs.	)
	)
CLIFTON S. COREY,	)
	)
Defendant.	)
	)

ORDER GRANTING THE GOVERNMENT'S MOTION IN LIMINE TO PROHIBIT OBJECTION TO JURISDICTION AS A MATTER OF LAW DURING TRIAL

The court heard the Government's Motion on June 23, 1997. Assistant United States Attorney Loretta A. Matsunaga, appeared at the hearing on behalf of Plaintiff; Samuel P. King, Jr., Esq., appeared at the hearing on behalf of Defendant. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS the Government's Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law During Trial.

BACKGROUND

The indictment in the instant case charges several years of incest between Defendant Clifton S. Corey

("Defendant") and his adopted, mentally retarded, minor daughter, Anna Louise. The indictment runs in reverse chronological order, in other words, the most recent molestation charged in the first count.

In apartments provided by the United States in the Philippines, the Defendant is alleged to have repeatedly molested Anna Louise. Defendant's sexual abuse of Anna Louise allegedly continued unabated given Anna Louise's dependency, age, isolation and limited mental capacities.

The Government alleges the following facts. On August 10, 1993, Defendant and Anna Louise moved to #18 Lopez Court, Manila, Republic of the Philippines. On February 20, 1996, Defendant and Anna Louise moved to #4 Lopez Court, Manila, Republic of the Philippines. These apartments, #18 and #4 Lopez Court, were apartments leased by the United States Secretary of State in order to house American Embassy employees and their families.

Counts 4 - 7 charge the Defendant with aggravated sexual abuse and sexual abuse, in violation of 18 U.S.C. § § 2241 (a) and 2242 (1), for acts which occurred between August 10, 1993, and May 31, 1996, in Lopez Court, Manila, when Anna Louise was 15, 16, 17, and 18 years old.

Counts 1 - 3 charge the Defendant with aggravated sexual abuse, sexual abuse, and abusive sexual contact, in violation of 18 U.S.C. § § 2241 (a), 2242 (1), and 2244 (a), for acts which occurred at #14 Lopez Court on August 25, 1996, when Anna Louise was 18 years old.

The Government brings this motion for the court to determine that Lopez Court, Manila, Republic of the Philippines, is within the special maritime and territorial jurisdiction of the United States.

DISCUSSION

Counts 1 - 7 charge Defendant with criminal acts which occurred at apartments #18 and #4 Lopez Court, Manila. Defendant claims that this court lacks territorial jurisdiction over this case. The issue is whether this court may properly assert jurisdiction over certain crimes committed by and against American civilians which allegedly occurred outside of the United States.

Defendant makes essentially two arguments contending that: (1) there is a jurisdictional gap which prevents prosecution of civilians for crimes allegedly committed overseas; and (2) 18 U.S.C. § 7 grants territorial jurisdiction over crimes committed on embassy compounds and because Defendant's private residence does not constitute part of the embassy compound, the court lacks territorial jurisdiction.

I. Jurisdictional Gap

Defendant cites two law review articles in support of his claim that there exists a jurisdictional gap which thwarts the attempted prosecution of civilians who allegedly commit crimes on military installations abroad. Defendant's law review articles have, at best, only slight relevance to this case.

The first article argues that "a jurisdictional gap now exists which permits some categories of crime to go unpunished." Lt. Col. Robinson O. Everett; Lt. Laurent R. Hourcle, *Crime Without Punishment - Ex-Servicemen, Civilian Employees and Dependents*, 13 AF JAG L. Rev. 184 (summer 1971). The article discusses the history of the status of civilians who accompany the armed forces overseas. Prior to the Untied States' Supreme Court decision in *Reid v. Covert*, 354 U.S. 1 (1957), the Uniform

Code made civilians serving "in the field" with the armed forces, subject to court-martial. *Id.* At 186. However, the *Covert* decision made trial by court-martial of civilians unconstitutional. Sine that time, the authors contend, Congress has been unable to adopt an effective solution for punishment of crimes committed by these civilians overseas.

Similarly, the second article discusses, in depth, the consequences of the *Covert* decision. The article addresses the question of whether "a civilian United States citizen accompanying our armed forces overseas [could] murder a Unites States service member and escape trial and punishment for the crime." Capt. Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas - - Still With Us*, 117 Milt. L. Rev. 153 (Summer 1987). The article discusses numerous cases involving the lack of military jurisdiction over civilians who murdered their servicemen husbands. According to the article, the Supreme Court's decision in *Covert* caused a jurisdictional void in which American civilians abroad could literally get away with murder. *Id.* at 171.

The McClelland article notably explains the rationale for the *Covert* Court's decision. Justice Black, writing for the majority, criticized military courts as putting less emphasis on protecting the individual than in civilian courts. *Covert*, 354 U.S. at 22. The opinion emphasized the Court's concern over military courts abiding by constitutional guarantees. The court reasoned that releasing civilian defendants who commit serious crimes, "was justified by the need to stop encroachment of military authority over civilians and reaffirm the extraterritorial validity of Bill of Rights guarantees." McClelland, supra at 156.

Defendant's articles have little relevance as they concern military law and courts-martial. The instant case concerns only the extraterritorial jurisdiction of the United States, not the jurisdiction of the military, over civilians abroad. Though both articles speak almost entirely to the lack of military jurisdiction over these civilians, the McClelland article briefly mentions 18 U.S.C. § 7 as a possible means of asserting jurisdiction:

> Without jurisdiction over these civilians, the United States may not try them in a foreign country for crimes they commit there. Like most other Americans abroad, they may only be tried in the host country by host country courts. If the host country for some reason does not exercise its jurisdiction, these *civilians might still be tried in the United States for the crimes committed overseas if there were statutes giving the United States extraterritorial jurisdiction over such offenses.* Currently, the United States only *has extraterritorial jurisdiction within its special maritime and territorial jurisdiction* and for certain individual offenses clearly extraterritorial in nature, such as treason. *The special maritime and territorial jurisdiction covers United States embassy compounds, United States ships on the high seas, and other limited locations* (not including overseas military installations). Most offenses committed by civilians accompanying our forces do not fall within this jurisdiction. The UCMJ has extra-territorial reach, but *Covert* foreclosed its application to civilians.

McClelland, supra at 174 (emphasis added). According to Defendant's own article, jurisdiction may exist if: (1) there are statutes giving the United States extraterritorial

jurisdiction over certain offenses, and (2) the crime occurs within the special maritime and territorial jurisdiction including "embassy compounds, United States ships on the high seas, *and other limited locations* (not including overseas military installations)." *Id.* (emphasis added).

This position is not inconsistent with relevant case Law on the subject. The Fourth Circuit has held that federal courts have jurisdiction over criminal acts committed by American citizens outside the United States. *U. S. v. Erdos*, 474 F.2d 157, 159 (4th Cir. 1973); *cert. denied*, 414 U.S. 876 (1973). However, in order for federal law to apply to American citizens abroad, there must be a showing that Congress intended the law to have such an effect. *Blackmer v. United States*, 284 U.S. 421, 437 (1932).

In other words, the United States must have extraterritorial jurisdiction over the charged crimes. In sharp contrast to 10 to 20 years ago when the Everett and McClelland articles were written, today there are various criminal statutes which give the United States extraterritorial reach over the commission of certain enumerated offenses. Congress has expressly authorized the prosecution of individuals within the special maritime and territorial jurisdiction of the United States who are charged with crimes of aggravated sexual abuse, 18 U.S.C. § 2244.[1] These federal statutes evidence a clear con-

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[1] 18 U.S.C. § 2241 provides in relevant part:

(a) By force or threat. – *Whoever*, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes anther person to engage in a sexual act –

(continued...)

gressional intent to exert extraterritorial jurisdiction over American citizens who commit any of these crimes falling within the special maritime and territorial jurisdiction of the United States.[2]

Therefore, the "jurisdictional gap" asserted by Defendant simply does not apply in the instant case. Indeed, the exercise of federal court jurisdiction in this case would satisfy the concerns of the *Covert* Court by assuring that Defendant, a civilian charged with enumerated federal

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[1](...continued)

> (1) by using force or against that person; or
> (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnaping;
>
> or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both. (emphasis added).

The statute does not specifically state whether it applies to civilians. However, this fact can be assumed because the United States District Court would not be the venue to try active duty members of the armed forces. Rather, the appropriate remedy in such cases is courts-martial.

[2] The *Erdos* court held that the federal manslaughter statute embodied in 18 U.S.C. § 1112 is a specific grant of subject matter jurisdiction with respect to manslaughter committed on land within the special maritime and territorial jurisdiction of the United States. *Erdos*, 474 F. 2d at 160.

crimes, receives the constitutional protections of trial in the United States federal court system.

II. Embassy Compounds

Defendant concedes that "[t]here is no question that the United States has jurisdiction over crimes which occur on embassy compounds." Defendant's Memo at 5-6. However, Defendant claims that the private residence where he lived and where the alleged acts of sex abuse occurred is not part of the "embassy compound" or "premises of the mission." Defendant argues that if the land is not part of the embassy compound, this court lacks territorial jurisdiction. The issue is whether the apartments in which the alleged crimes took place must comprise a physical part of the main embassy in order for jurisdiction to attach.

Title 18 U. S. C. § 7(3) provides in relevant part as follows:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:
>
> * * * *
>
> (3) *Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof,* or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7(3) (emphasis added). Under the statute, whether lands are reserved or acquired for the use of the United States for purposes of "special maritime and territorial jurisdiction" depends upon the practical usage

and dominion that the government exercises over the embassy or other federal establishment. *Erdos*, 474 F.2d at 160. The fact that the United States does not actually own the property is not dispositive. *Id.* At 159.[3]

In *Erdos*, the court held that 18 U.S.C. § 7(3) was a proper grant of special territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction. The court looked to the plain language of the statute which grants such jurisdiction to "*[a]ny* lands reserved or acquired for the use of the United States...." *Id.* (emphasis added). The court concluded that the federal government exercises a sufficient amount of dominion and control over embassies. Because of the United States' practical usage, dominion and control over embassies, the court also found that the United States exercises concurrent jurisdiction on embassy grounds. Contrary to Defendant's assertions, the court did not hold that the special territorial jurisdiction is limited to embassies, but rather that the test "as to property within or without the United States, its one of the practical usage and dominion exercised over the embassy or *other federal establishment* by the United States government." *Id.* (emphasis added). This court finds the rationale of the *Erdos* court to be persuasive.

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[3] The embassy in *Erdos* was leased by the United States from private citizen of the new Republic of Equatorial Guinea. In finding that jurisdiction existed over the acquired land, the Fourth Circuit stated that "fee simple 'ownership' of the property by the United States is not a prerequisite to such jurisdiction." *Erdos*, 474 F.2d at 159.

The Government argues that because the American Embassy housing apartments #18 and #4 Lopez Court were property "reserved or acquired for use of the United States," the first part of § 7(3) is satisfied. The Government contends that the Secretary of State entered into a lease with the Fran-Lil Corporation to acquire both properties.

Apartments #18 and #4 were two of the 175 units of housing utilized by the American Embassy. Both of the apartments were leased by the United States Embassy, which were and continue to be maintained in the American Embassy in the Republic of the Philippines' housing pool. The apartments were occupied by 175 American employees of sixteen agencies. The housing assignments were made by an Inter-Agency Housing Board, and, when a unit was vacated by an employee, it was usually occupied within a matter of one to two months by an incoming employee. Lease renewals were generally made for two to four year periods.

As the lessee of apartments #18 and #4 Lopez Court, the United States had control over it during the term of the lease. At the hearing, Judy Senykoff[4] testified that the United States negotiated the lease, signed the lease, paid the rent, and controlled who lived in the apartments. She explained that the United States decided how long each tenant could stay on the property and conducted all

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[4] Ms. Senykoff is a housing officer for the United States embassy in Manila. She explained that Lopez Court was used as part of the Embassy's housing pool. Her testimony indicated that #18 and #4 Lopez Court comprised part of the mission premises.

maintenance such as repairing, painting and restoring the property as necessary. Whenever landlord-tenant concerns arose, individuals dealt directly through the U.S. Government housing office. In light of the foregoing and because the United States maintained these properties for the express purpose of supporting its diplomatic efforts abroad, this court finds that apartments #18 and #4 Lopez Court in Manila, Republic of the Philippines were properties reserved or acquired for use by the United States.

Moreover, Rex Young[5], testified that he believed the Embassy Housing to be part of the "mission premises" as defined in the Vienna Convention. At the hearing, the Government argued that pursuant to the Vienna Convention, the administrative and technical staff of the mission are immune from prosecution by the Philippine government. Because Defendant was technical staff of the mission[6], the Government contends that this court should

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[5] Rex Young is an attorney for the Department of Justice criminal division. He worked for the INS since 1980 in the Office of International Affairs, criminal division. He has extensive experience in the area of American Diplomatic missions abroad.

[6] Defendant admitted on the stand that as a postal worker who provided postal service for the mission, he was part of the administrative or technical staff of the mission, though employed by the United States Air Force. Relevant is the fact that Defendant applied for and was issued a diplomatic passport for entry to and from

(continued...)

consider Defendant outside of the jurisdiction of the Philippine government and within the jurisdiction of the United States.

In the instant case, Defendant's alleged crimes from 1993 to 1996 were committed in apartments which were leased by the United States in order to house American citizen employees serving the American Embassy in Manila. Although it provides additional support for finding of jurisdiction, this court does not reach the issue of whether the apartments actually comprised part of the Embassy because under the plain language of the statute and persuasive case authority, it is sufficient that the United States exercised the requisite dominion, practical usage, and control over the property in question.[7] The *Erdos* standard is met in this case, as the property was acquired in a foreign country which the federal government used and controlled even though the government did not own the property. Moreover, as the Philippine government exercises virtually no control over the Embassy Housing, the court finds that the United States has concurrent jurisdiction over the property. Because the crimes charged in Counts 1-7 took place in the

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[6](...continued)
Manila. Although he claimed the passport was merely for efficient entry into the country, it was nonetheless a diplomatic passport which is not generally available to American citizens traveling abroad.

[7] The court would note, however, that the Government presents a strong and compelling case that the housing is part of the premises of the Embassy mission.

Embassy housing in Manila, this court finds that they fall withing the special maritime and territorial jurisdiction of the United States.

CONCLUSION

For the reasons stated above, the court GRANTS the Government's Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law During Trial.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 7, 1997.

S/David Alan Ezra
DAVID ALAN EZRA
United States District Judge

United States of America v. Clifton S. Corey, Cr. No. 96-01019 DAE; ORDER GRANTING THE GOVERNMENT'S MOTION IN LIMINE TO PROHIBIT OBJECTION TO JURISDICTION AS A MATTER OF LAW DURING TRIAL

(This is an unreported decision.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,) Cr. No. 96-1019DAE
)
Plaintiff,)
)
vs.)
)
CLIFTON S. COREY,)
)
Defendant.)
)

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT AND GRANTING THE GOVERNMENT'S MOTION IN LIMINE

The court heard both Defendant's Motion and the Government's Motion on April 14, 1998. Assistant United States Attorney Loretta A. Matsunaga, appeared at the hearing on behalf of the Government; Samuel P. King, Jr., Esq. appeared at the hearing on behalf of Defendant. After reviewing the motion and supporting and opposing memoranda, the court DENIES Defendant's Motion to Dismiss Indictment, and GRANTS the Government's Motion in Limine to Prohibit Objection to Jurisdiction.

BACKGROUND

On January 29, 1997, Defendant was charged with 11 counts of sexual abuse of his adopted, mentally retarded daughter. Counts 1-3 charged Defendant with aggravated sexual abuse, sexual abuse, and abusive sexual contact, in violation of 18 U.S.C. § § 2241 (a), 2242 (1), and 2244 (a), respectively. Counts 4-7 charged Defendant with aggravated sexual abuse and sexual abuse, in violation of 18 U.S.C. § § 2241 (a) and 2242 (1), respectively. Counts 8-11 charged Defendant with sexual abuse of a minor.

On June 12, 1997, the Government filed its Motion in Limine to Prohibit Objection to Jurisdiction as a Matter of Law during Trial, and the court heard evidence on this matter on June 23, 1997. On July 1, 1997, the United States dismissed Counts 8-11, as newly acquired birth certificate revealed that the victim was not a minor at the time of the incidents. The court issued its Order Granting the Government's Motion in Limine on July 7, 1997, as to Counts 1-7, the remaining Counts in the indictment.

On July 1, 1997, a jury was selected and sworn as the jurors for the criminal charges brought by the Government against Defendant. On July 17, 1997, a mistrial was declared as the jury was unable to agree on a finding in this matter. On July 25, 1997, the Government filed a Third Superseding Indictment of the original Counts 1-7, as well as including charges of aggravated sexual abuse and sexual abuse for incidents originally charged under Counts 8-11.

On August 5, 1997, the Government renewed its Motion in Limine regarding Counts 8-11. Defendant did not file an Opposition Memorandum, and instead on February 17, 1998, Defendant filed a Motion to Dismiss

the Indictment. Essentially, Defendant is asking the court to reconsider it's earlier decision as to Counts 1-7. The Government filed its Opposition Memorandum on February 20, 1998, and on March 31, 1998, Defendant filed a Supplemental Memorandum in Support of Motion. The court considers both the Government's Motion in Limine, and Defendant's Motion to Dismiss Indictment in this order.

DISCUSSION

Counts 1-3 of the Third Superseding Indictment charge Defendant with aggravated sexual abuse, sexual abuse, and abusive sexual conduct, in violation of 18 U.S.C. § § 2241 (a), 2242 (1), and 2244 (a), for acts occurring at #4 Lopez Court in Manila on August 25, 1996, when Defendant's adopted daughter was 18 years old. These apartments were leased by the United States to house American embassy employees and their families. Counts 4-7 charge Defendant with violation of 18 U.S.C. § § 2242 (a) and 2232 (1), for acts occurring between August 10, 1993 and May 31, 1996, at apartment #18 and #4, Lopez Court, Manila, when Defendant's adopted daughter was 15, 16, 17, and 18.

The charge for Counts 8 and 9 of this Third Superseding Indictment occurred from August 10, 1993, to February 17, 1994, at apartment nos. 18 and 4 at Lopez Court, Manila, Republic of the Philippines. The incidents serving as the basis for Counts 10 and 11 occurred between June 16, 1992, and August 10, 1993, while Defendant was employed as a civilian for the United States Air Force Yokota Air Base in Japan. Defendant

resided on Yokota Air Base with his daughter during that time.

I. Counts 1 through 7.

In the July 7, 1997 Order Granting the Government's Motion in Limine, the court found that the United States has jurisdiction over Counts 1 through 7, the incidents which allegedly occurred at apartment nos. 18 and 4, Lopez Court in Manila, Republic of the Philippines, as the properties were reserved or acquired for use by the United States, and the United States has concurrent jurisdiction over the property. Thus, the court held that the property falls within the special territorial jurisdiction of the United States. July 7, 1997 Order at 10-13.

After receiving Defendant's motion, the court reviewed its previous Order along with the memoranda supporting Defendant's motion. It also re-evaluated the statutory authority and the case law relied upon in the Order. After lengthy review, the court finds no reason to stray from its previous Order. Accordingly, the court refers to its previous order, and hereby incorporates in the instant Order, the analysis and discussion in the July 7, 1997 Order, and finds that it has jurisdiction over Counts 1-7 of the Third Superseding Indictment.

II. Counts 8 and 9.

Given that Counts 8 and 9 of the Third Superseding Indictment occurred in the same apartments at Lopez Court in Manila, Republic of Philippines, the court finds that it also has jurisdiction over Counts 8 and 9, as Lopez Court, Manila falls within special territorial jurisdiction of the United States as defined by 18 U.S.C. § 7.

III. Counts 10 and 11.

As discussed above, Counts 10 and 11 occurred on Yokota Air Base in Yokota, Japan. The Government contends that Yokota Air Base is also a place within the special territorial jurisdiction of the United States. Defendant objects to jurisdiction asserting that 18 U.S.C. § 7 (3) does not encompass location abroad, and certainly does not apply to crimes committed on Yokota Air Base.

There is no "constitutional bar" to the extraterritorial application of criminal statutes. *See Unites States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991). In order to make the determination as to whether Congress intended a statute to apply outside of the physical borders of the United States, the court must look to Congressional intent. *Id, see also United States v. Vasquez-Velasco*, 15 F.3d 833, 839 (9th Cir. 1994). In *Vasquez-Velasco* the Ninth Circuit noted that there are some statutes where the court "may infer that extraterritorial application is appropriate from 'the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved.' "*Vasquez-Velasco*, 15 F.3d at 839 (citing *Felix-Gutierrez*, 940 F.2d at 1204) (internal quotations omitted). The statute in that case was a racketeering statute, and the crime charged was murder committed in an effort to aid the trafficking of drugs. While *Vasquez-Velasco* is not directly applicable here, the fact that the court can sometimes infer Congress' intent is significant.

In the instant case, the court must first consider whether Congress intended 18 U.S.C. § § 2241, 2242 and 2244 to apply extraterritorially. Each of these statutes applies to "[w]hoever, in the special maritime and territorial jurisdiction of the United States [,]. . . . " commits the specified acts. 18 U.S.C. § § 2241, 2242 and

2244 (West Supp. 1998). Special maritime and territorial jurisdiction of the United States is defined in 18 U.S.C. § 7 as including:

> [a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7 (West 1969). Hence, we review 18 U.S.C. § 7, to determine whether Congress intended the definition of special territorial jurisdiction to include lands outside the physical boundaries of the United States and its known territories. If the statute was intended to include extraterritorial lands, the court must then ensure that the application would be reasonable under principles of international law.

In its July 7, 1997 Order, the court found that Congress intended 18 U.S.C. § 7 to include lands outside of the physical boundaries of the United States and its known territories. The court adheres to that determination. In *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973), for example, the Fourth Circuit closely analyzed 18 U.S.C. § 7, and found that it was "a proper grant of 'special' territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction." There is nothing in 18 U.S.C. § 7, which indicates that Congress only intended to define lands within the physical boundaries of the United States, or its already existing territories. Thus, the term "special territorial jurisdiction" must stand for something

other than regular territorial jurisdiction. This court agrees with the Fourth Circuit that 18 U.S.C. § 7 creates "a jurisdiction category: lands reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction." *Id.* Consequently, by including the term "special territorial jurisdiction" in 18 U.S.C. § § 2241, 2242 and 2244, Congress intended these criminal statutes to apply extraterritorially.

Therefore, if Yokota Air Base falls within the definition of special territorial jurisdiction of the United States, as expressed in 18 U.S.C. § 7, and such an application would be consistent with international law, then this court has jurisdiction over the charges against Defendant which occurred on Yokota Air Base.

II Yokota Air Base.

The United States took control over the area upon which Yokota Air Base now lies after World War II. During the 1952 negotiations, the United States and Japan agreed that Japan would have the right to self-government, and the United States would retain certain areas of the country such as Yokota Air Base. *See* Minutes of the 8th Meeting of the Primary Working Group Under Exchange of Notes Between the Government of the United States and Japan on 28 February 1952, Exhibit B, Government's Motion in Limine. The Status of Forces Agreement ("SOFA"), was signed in 1960. The SOFA provides that the United States, "within the facilities and area, . . . may take all the measures necessary for their establishment, operation and safeguarding." SOFA intents and purposes, the United States controls the conduct and authority of individuals, along with determining access to Yokota Air Base in Japan. The

Government also points out that the United States conducts "all searches, seizures, and arrests" on Yokota Air Base, can allow "the practice of medicine and law, unlicensed by Japan, within the boundaries . . . [of Yokota Air Base, and can] permit gambling, [which is] illegal in Japan," Government's Motion at 12.

The United States military has occupied Yokota Air Base, uninterrupted, since World War II until the present. It is true that the United States does not own the land upon which Yokota Air Base lies, however, it is not necessary to show ownership. The Air Base merely has to be "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . . ." 18 U.S.C. § 7 (West 1969). According to the court in *United States v. Erdos*, 474 F.2d 157, 160 (4th Cir. 1973), whether lands are reserved for the use of the United States depends upon the practical control exercised by the United States the lands. Here, there is no question that Yokota Air Base was reserved for the use of the United States. The United States wholly and solely operates Yokota Air Base, and completely controls the personnel and visitors on the Air Base without any interference from the government of Japan.[8]

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[8] The Government refers to a Japanese Supreme Court case, *Fukamoto v. Japan*, Japanese Supreme Court Case No. 611, 1988 (0), February 25, 1993, in which the Japanese Supreme Court found that the Government of Japan could not interfere with the United States' operating authority over the Yokota Base airfield. *See* Government's Motion at 13.

Defendant argues that "Paragraph 1(a) [of the SOFA] gives U.S. "military authorities" (not the United States District Courts) "the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States," and is therefore limited to situations where some U.S. legislation applies in Japan." Defendant's Supplemental Memo. at 4. Defendant uses this to support his contention that this court lacks jurisdiction. Nevertheless, it actually supports the opposite conclusion, as this grant of authority to the United States exemplifies the control and dominion which the United States exemplifies the control and dominion which the United States enjoys on Yokota Air Base. The fact that the SOFA refers to "military authorities" and not United States federal district courts is not surprising considering that the personnel and law enforcement officials on Yokota Air Base are military authorities, and not United States federal district courts.

Additionally, the SOFA provides that:

> In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> > (a) The military authorities of the United States shall have primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to
> >
> > > (i) offenses solely against . . . the person or property of another member of the United States armed forces or civilian component or of a dependent;

Article XVII (3) (a) (I) SOFA, Exhibit C, Government's Motion. This is further recognition of two significant

factors. First, that the United States maintains primary authority over civilians on the base, and over any crimes committed by them against their dependents, and second, that the United States, at times, has exclusive jurisdiction, as well as concurrent jurisdiction, over Yokota Air Base and the personnel therewith.

Defendant argues that the SOFA does not confer jurisdiction on this court, and only confers jurisdiction on the military authorities. The court agrees that its jurisdiction over Defendant's alleged activities is not founded in the SOFA. However, the court is not required to look to the SOFA for jurisdiction. Instead, the court uses the SOFA to determine the relationship that the United States has with Japan with regard to Yokota Air Base, and the control that the United States, as a sovereign, has over Yokota Air Base.

Jurisdiction is conferred on this court by the criminal statutes if, pursuant to 18 U.S.C. § 7, the land is reserved for the United States, and the United States exercises exclusive or concurrent jurisdiction over it. Given the discussion, it is evident that Yokota Air Base is land reserved to the United States, and that the United States exercises both exclusive and concurrent jurisdiction of the land and the individuals residing and working on the Air Base.

The Government relies upon the Second Circuit's finding that it had jurisdiction over civilians on Guantanamo Bay in Cuba. *See Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326, 1342 (2d Cir. 1992), *cert. granted, judgment vacated by Sale v. Haitian Centers Council, Inc.*, 509 U.S. 918 (1993). The Second Circuit allowed the issuance of a preliminary injunction for Haitian aliens, residing on the military base in Guantanamo Bay, who were

challenging INS procedures. *Id.* at 1347. The court examined the relationship between the United States and Cuba with regard to Guantanamo Bay. The court noted that "Guantanamo Bay is a military installation that is subject to the exclusive control and jurisdiction of the United States." *Id.* at 1342. The court made this finding even though the lease provisions and the subsequent treaty expressly allowed the United States to use Guantanamo Bay for "coaling or naval stations only, and for no other purpose." *Id.* Significantly, the lease did not provide for the detention of Haitians at Guantanamo Bay, nonetheless the Second Circuit did not find that it's jurisdiction was in any way limited by the lease and treaty provisions which stated that the United States only had authority for coaling or naval stations on Guantanamo Bay.

Defendant argues that Guantanamo Bay is "unique," and a "special case,"[9] because the lease and treaty state that the United States "exercise[s] complete jurisdiction and control" over Guantanamo Bay. *Haitians Centers Council,* 960 F.2d at 1342. The court does not agree that Guantanamo Bay is a "unique" case. The language of the SOFA for Yokota Air Base may not be as explicit, still, it is compelling. It too provides for jurisdiction to the United States, through its military authorities located in Japan, both exclusive and concurrent. To fall within the definition of "special territorial jurisdiction," the United States is not required to always exercise exclusive jurisdiction over the land. In fact, the definition in 18 U.S.C. § 7 (3), provides that jurisdiction can either be

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[9] Defendant's Motion to Dismiss at 9-10.

exclusive or concurrent. Thus, Defendant's attempt to distinguish Guantanamo Bay from Yokota Air Base as "unique," is without merit.

Finally, the court finds that it would not be unreasonable under principles of international law for this court to exercise jurisdiction over crimes of sexual abuse and assault occurring on Yokota Air Base between an American civilian, and his dependent. The SOFA expressly states that the United States' authorities, and not the Japanese authorities, shall have primary jurisdiction over crimes committed by American civilians against civilian dependents. Thus, the treaties will not be offended by such an exercise of jurisdiction in this case.

II Final Analysis.

Defendant and his expert Professor Jordan J. Paust continually refer to the existence of a "jurisdictional gap" which was allegedly created by the United States Supreme Court's decision in *Reid v. Covert*, 354 U.S. 1 (1957). In *Reid* the Court found that a civilian dependent of an armed forces member stationed overseas could not be constitutionally tried under the Uniform Code of Military Justice for capital offense, in times of peace. 354 U.S. at 5. The Court did not discuss the applicability of 18 U.S.C. § 7, nor did it acknowledge the creation of a jurisdictional gap.

This court simply disagrees with Defendant's characterization of the jurisdictional aspect of this case. Defendant complains that Congress has not bridged the "jurisdictional gap" created by *Reid*, and finds this persuasive for his position. However, the court finds that Congress would not allow such a gap to exist, for it would create a sense of insecurity on overseas lands in the

"special territorial jurisdiction" of the United States. This court believes that Congress' failure to act, actually demonstrates the "nonexistence" of such a gap. If indeed, a jurisdictional gap created by *Reid*, Congress would have already acted to bridge the gap. Thus, from this court's perspective Congress' inaction supports the notion that Congress intended 18 U.S.C. § 7 to include lands outside of the physical boundaries of the United States and its already known territories, of which the United States has reserved or acquired, and over which the United States exercises either exclusive or concurrent jurisdiction. As the housing located at Lopez Court in Manila, and Yokota Air Base, both qualify under 18 U.S.C. § 7 as special territorial jurisdiction of the United States, this court has jurisdiction over the charges for which Defendant is indicted.

If the court were to agree with Defendant's arguments, then American civilians abroad would be free to commit crimes in these overseas installations against other Americans with impunity since they could not be tried in time of peace by the military under the UCMJ, or in the U.S. District Court - - to support Congress intended such a result tests the bounds of credulity. Accordingly, Defendant's Motion to Dismiss Indictment is DENIED, and the Government's Motion in Limine to Prohibit Objection to Jurisdiction is GRANTED.[10]

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[10] Because the court finds that it has jurisdiction over the criminal charges pending against Defendant pursuant to 18 U.S.C. § § 2242 and 2244, based upon the definition in 18 U.S.C. § 7 (3), therefore the court need not consider

(continued...)

CONCLUSION

For the reasons stated above, the court DENIES Defendant's Motion to Dismiss Indictment, and GRANTS the Government's Motion in Limine to Prohibit Objection to Jurisdiction.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 16, 1998.

S/ David Alan Ezra
DAVID ALAN EZRA
United States District Judge

United States of America vs. Clifton S. Corey, Cr. No. 96-01019 DAE; ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT AND GRANTING THE GOVERNMENT'S MOTION IN LIMINE

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[10](...continued)
the Government's argument that 18 U.S.C. § 7 (7) also provides jurisdiction.